

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS

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To

IRENE REITERMAN SANDIFER

and

MURIEL REITERMAN SANDIFER

PREFACE

While assisting Professor Charles Cheney Hyde, Counsel to the Government of Guatemala in the Guatemalan-Honduran Boundary Arbitration (1931-1933), the author experienced great difficulty in ascertaining the existing practice of international tribunals in the treatment of certain matters of evidence. Convinced of the urgent practical need for such a study, he undertook, with the encouragement of Professor Hyde, an examination of all available arbitral records, with a view to presenting a comprehensive statement of the rules relating to the production of evidence before international tribunals. This book is the product of that study. It is designed to serve as a practical guide for attorneys, governments, and tribunals in dealing with questions of evidence, and as an analytical and comparative treatise, and a basis of further study and investigation for students and scholars.

It was found impossible to portray intelligibly international practice in the treatment of evidence without giving consideration to the corresponding practice of municipal tribunals. The importance of the background of common and civil law rules to such a study has been suggested by Lauterpacht: "It is especially with regard to the relative authority of common and civil law rules of evidence, and to the beneficial influence which the clash and the subsequent mutual adjustment of these two systems of rules exercised upon the work of international tribunals, that such a study is bound to prove most fruitful." (*Private Law Sources and Analogies of International Law*, London, 1927, p. 211.) On the other hand, Wigmore has given recognition to the significance of international practice in matters of evidence to students of municipal law by including a section on "International Arbitral Tribunals" in the *Supplement* to the second edition of his treatise on the Anglo-American law of evidence. (*A Supplement 1923-1933, Evidence in Trials at Common Law*. Boston, 1934, section 4m, pp. 47-55.) Consequently, the study was expanded to include an analysis of the origins of existing international practice and of the comparative influence of Anglo-American and civil law on its development.

The author is deeply indebted to Professor Hyde of Columbia University for his assistance and encouragement in the prosecution of this study, and for his meticulous examination of the manuscript. He also wishes to express his appreciation to Professors

PREFACE

Joseph P. Chamberlain, Philip C. Jessup, and Francis Deák of Columbia University for reading the manuscript and making many valuable suggestions. Mr. Fritz Moses of the New York Bar, and formerly Judge at the Landgericht in Berlin generously furnished the materials for the references to the German Code of Civil Procedure.

To Irene Reiterman Sandifer the author owes his greatest obligation. She spent countless hours of painstaking and unselfish labor assisting in the preparation of the manuscript.

It is the author's hope that the service rendered by this book may justify the liberal assistance in its publication extended by the Carnegie Endowment for International Peace through the Division of International Law.

DURWARD V. SANDIFER

Department of State,
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CHAPTER I

THE NATURE AND SOURCES OF THE RULES OF EVIDENCE

FUNCTION AND NATURE OF THE RULES

Section 1. The Function of Evidence in Municipal and in International Tribunals. The primary concern of this study is the process or mode of presenting evidence before international tribunals rather than the determination of what constitutes evidence. What the ensuing examination of the practice of these tribunals in the reception and treatment of evidence is concerned with is "the process of presenting evidence for the purpose of demonstrating an asserted fact."¹ As Thayer says in characterizing the rules of evidence in Anglo-American law, so here the "rules . . . relate to the mode of ascertaining an unknown, and generally a disputed matter of fact in courts of justice."²

The course which the rules of evidence have taken in their development can be better understood if the function of evidence in the judicial process is first clearly perceived. Ideally considered, its function is the same in municipal and in international tribunals, that is to enable the tribunal to discover the truth concerning the conflicting claims of the parties before it. However, this ideal function has been somewhat modified in municipal judicial proceedings by the character which they have generally assumed. They have become, especially in Anglo-American law, judicially regulated contests of wit in which the parties are combatants, the judge acting as a disinterested and nonparticipating umpire whose principal function is to see that the combat proceeds according to the rules. The initiative is almost entirely in the hands of the parties, the decision going to the party who makes the cleverest use of the rules in getting his evidence before the judge or the jury, as the case may be. The aim of the proceedings is not to discover the truth, in the absolute sense of that term, but to see that evidence is brought before the court in accordance with the established rules, and to award the victory to the party who succeeds in getting the most convincing evidence through the rules. In a

¹ I Wigmore's *Evidence* 3.

² James Bradley Thayer, "Judicial Notice and the Law of Evidence,"

3 Harv. L.R. 142 (1889-1890).

way this is a natural, and to a certain extent, an inevitable situation. It arises principally from the insistence that judges and courts shall be wholly impartial in conducting proceedings and arriving at decisions. The parties being private litigants, it is the function of the state, according to this view, merely to furnish them a forum for the peaceful settlement of their conflicts, to supervise the conflicts, and to execute the results. This condition is not so extreme in civil law countries³ where the rules of evidence, especially with respect to admission and exclusion, are not so technical. Also, the judges take a much more active part in the direction of the proceedings, and in the examination of the witnesses. For example, in Germany the judge is active even in the formulation of the issues on the basis of the statements of fact submitted by the parties.⁴

The truth which is sought and attained in municipal tribunals is, therefore, distinctly relative. If a rule of evidence is invoked by one party to block the submission of evidence by the other which might throw additional light on the questions at issue, the function of the judge is only to determine whether the rule is properly invoked regardless of the effect on the disclosure of the actual facts involved. The law of evidence in international tribunals gives much wider scope for the ascertainment of truth in the absolute sense. Needless to say, such truth is by no means always attained. The difficulties of getting at the facts are frequently greater in litigation between states than between individuals, because of the complex issues involved, and because of the lapse of time between the event and the initiation of the proceedings. Nevertheless, it will be observed in the ensuing pages that international tribunals are, in general, preoccupied with getting at the facts of the questions presented for their decision. They are as a result intolerant of any restrictive rules of evidence which might tend to confine the scope of a search after those facts. With certain exceptions, they do not hesitate to supplement, upon their own initiative, the evidence supplied by the parties if they regard

³ The term "civil law" as used in this study is a word of convenience, not one of art, and is used as a matter of convenience for want of a better term. To adopt the words of Deák writing on "The Place of the 'case' in the Common and the Civil Law," the writer is "fully aware of the lack of precision inherent in the generalization." 3 Tulane L.R. 342.

Another writer properly warns against the "erroneous idea" of the "uniformity of the non-Anglo-American legal systems." "Such uniformity," he says emphatically, "does not exist." Fritz Moses, "International Legal Practice," 4 Fordham L.R. 255-256 (1935).

According full recognition to this variety as to details in the procedure of these various countries, it is believed, nevertheless, that there is sufficient uniformity in their broad approach to matters of evidence to warrant lumping them together under the term "civil law countries" in contrast to the Anglo-American countries which have a distinctly different approach.

⁴ Karl von Lewinski, "Courts and Procedure in Germany," 5 Ill. L.R. 198-201 (1910-1911). See also *infra*, secs. 37, 72.

it as inadequate. In municipal law a nonsuit or a judgment by default may result from the production of inadequate evidence, but in international proceedings tribunals are extremely reluctant to base a decision on such grounds, even where they have the authority to do so, with the exception perhaps of claims commissions where the real parties in interest are primarily the individuals concerned rather than the states.⁵

Section 2. The Character of International Judicial Proceedings. International judicial proceedings derive a distinctive character from the fact that the parties are sovereign states. From this fact it follows that the consequences of error or a failure to ascertain the facts in reaching a decision are, in many instances, more far reaching in their effect than in litigation between ordinary private parties in municipal tribunals. The vital interests of states, directly concerning the welfare of thousands of people, may be adversely affected by a decision based upon a misconception of the facts. The maintenance of friendly relations between the states involved may well depend upon the fairness and thoroughness of the proceedings through which a decision is reached.

The importance of arriving at the facts in controversy which flows from this composition of the parties to international judicial proceedings has been a factor of decisive influence in the development of the law of evidence in such proceedings. Technicalities are taboo. This is the view taken by the Permanent Court of International Justice. In its judgment of June 7, 1932, in the case of the *Free Zones of Upper Savoy and the District of Gex*, in overruling the demand of the Swiss Government that the Court reject as inadmissible certain submissions made by the French Government at a late stage in the oral proceedings, the Court declared that "the decision of an international dispute of the present order should not mainly depend on a point of procedure."⁶

The Permanent Court has been very liberal, as will be seen later, in the admission of evidence submitted at any time before the submission of the case to the tribunal for decision.⁷ In a session of the Court on June 28, 1926, devoted to a consideration of a revision of the rules of the Court, the President, M. Huber, said in commenting upon a proposal by the Registrar to add to Article 41⁸ the words, "and no more documents may be filed by the Parties except at the request of the Court," that he thought that "it would be somewhat dangerous to adopt too rigid a rule." Strict rules might be warranted in municipal proceedings, based on a known code and a well established jurisprudence, since the par-

⁵ For a discussion of the practice with respect to judgment on a *prima facie* case and judgment by default, see *infra*, secs. 35, 36.

⁶ Series A/B No. 46, pp. 155-156.

⁷ *Infra*, sec. 17.

⁸ For text, see Appendix III.

ties knew in advance what they had to produce, but before the Court it might be difficult to determine in advance what attitude the other party would adopt. In these circumstances it would be better that the Court have liberty to accept further documents at a late stage "reserving its right not to take them into account," and provided that such documents should not be furnished except with the consent of the Court. "*They must not run the risk,*" M. Huber declared, "*of a case between two States being decided on the basis of a purely formal administration of justice.*"⁹ [Italics added.]

Keenly alive to these implications involved in the presence before them of sovereign states as litigants, international tribunals generally insist on their right to seek the truth wherever it may be found. The general practice was well stated by the War Claim Arbiter, appointed by the President of the United States under the Settlement of War Claims Act of 1928, in the course of his discussion of evidence of the value in one country of patents issued in another:

"But the Arbiter's rules governing the admissibility of evidence are not technical but are most liberal in the interest of arriving at the truth whatsoever form it may take, and where the claimant proffers evidence tending to establish the value in foreign countries of the patented invention, together with evidence of the conditions existing there as compared with those existing in the United States at the pertinent time, such evidence will be *admitted* for what it may be worth, and the weight to which it may be entitled will be determined by the Arbiter."¹⁰

⁹ Series D, No. 2 (add.), pp. 100, 101-102. The Registrar's proposal was rejected by the Court. In explanation of his proposal the Registrar said:

"The Registrar explained that in certain cases it had happened that, after the proceedings had been closed, one of the Powers concerned had nevertheless submitted documents which were not documents of procedure properly so-called, but evidence. A decision of the Court had been necessary to say whether these documents should be accepted, and, if so, whether they should be communicated to the other Party; and in that case again, whether that other Party could be authorized to produce counter-evidence. The result had been a considerable loss of time. Furthermore, at certain times during the deliberations, it might be doubtful whether the court was in possession of all the information or whether it should still wait before giving its decision. It was in order to put an end to this situation that it would be desirable to state the wishes of the Court in an article.

"The Registrar pointed out that Article 40 spoke of a Case and a Counter Case, but the Rules were silent as regards the Reply and Rejoinder. Now, it had actually happened that annexes to the Reply had not been submitted together with it, but only at the commencement of the oral proceedings; that was manifestly wrong and it would be well to render it impossible."

¹⁰ War Claims Arbiter, Functioning under the Settlement of War Claims Act of 1928. *Administrative Decision No. II dealing with the bases of determining fair compensation in patent claims*, p. 61.

The Arbiter added: "In justice to the claimants they are here put on notice that ordinarily little weight will be given to evidence of this nature

In pursuance of this practice tribunals are generous in assisting litigants in obtaining all available evidence. Judge Van Eysinga put the matter aptly when he said in his separate opinion in the *Oscar Chinn* case in the Permanent Court of International Justice that "the Court is not tied to any system of taking evidence," but that "its task is to cooperate in the objective ascertainment of the truth."¹¹

The necessity of considering the character of international judicial proceedings has at times confronted domestic commissions or tribunals set up for the purpose of adjudicating claims international in origin. The matter is important for it may exercise a decisive influence upon the extent of the authority of the tribunal. It was argued before the Spanish Treaty Claims Commission, established by Act of Congress of March 2, 1901, to adjudicate the claims of American citizens against Spain, arising principally out of the disturbances in Cuba at the time of the Spanish-American War, that it was a court of the United States and not an international tribunal. Commissioner Chambers, in delivering the opinion of the Commission in the case of *Rita L. Ruiz* rejecting this contention, had the following to say with reference to the effect of the international character of the tribunal upon the flexibility of its authority in resolving both questions of fact and of law:

"The exact status of the Commission, therefore, in jurisprudence, whether domestic or international, is by no means so important a question as the one of its powers. What can it do, rather than what we may call it, is the question of vital interest and consequence.

"Congress in its wisdom apprehended and unquestionably appreciated the difficulties in the way of adjudicating the various classes of claims by a tribunal restricted in its operation to the settled rules of law, and consequently decided to clothe it with greater power and more discretion than are properly exercised by the ordinary courts of law. It was not alone because the Government had solemnly assumed, but because it desired to pay all the valid claims of its citi-

save in those exceptional cases where pertinent conditions in the United States and in the foreign country in question are shown to be similar."

So in the oral proceedings in the case of the *Whaling and Sealing Claims* against Russia, the Arbitrator, M. T.M.C. Asser said with reference to the protest by Mr. Peirce, Counsel for the United States, against the introduction of a deposition by an expert who was not present: "In an arbitration between States it is of far greater interest than in purely juridical proceedings to draw forth all evidence, whether direct or indirect, which may serve to give full light." 1902 For. Rel., Appendix I, 428.

¹¹ Series A/B, No. 63, p. 146.

"Les règles de preuve sont édictées moins encore dans l'intérêt des parties que dans celui de la vérité." J. C. Witenberg, "La théorie des preuves devant les juridictions internationales," Académie de droit international, *Recueil des Cours*, 1936, II, vol. 56, p. 90.

zens against Spain, that Congress created a tribunal with equitable powers so elastic that no complexity of facts or circumstances could or should prevent it from rendering such an award as the merits of the claim, the principles of justice and of international law require."¹²

Section 3. Consequent Non-Technical Character of the Rules of Evidence Generally Applied by International Tribunals. It follows from the general character of international judicial proceedings just described that tribunals are inclined to refrain from adopting restrictive rules with regard to the form, submission, and admissibility of evidence. The *ad hoc* character of most international tribunals has further contributed to this slow development of a definite body of rules relating to evidence. Each tribunal tends to be a law unto itself, the rules adopted and applied for the occasion being to a considerable degree determined by the legal background of the members of the tribunal.¹³ To this may be added the fact that tribunals, as a rule, are preoccupied with the determination of the substantive questions submitted for their decision at the expense of matters of procedure, not infrequently with unfortunate results on the work of the tribunal.

No rule of evidence thus finds more frequent statement in the cases than the one that international tribunals are "not bound to adhere to strict judicial rules of evidence." The considerations upon which this rule is based have been given an effective statement in the opinion of Umpire Duffield in the *Faber* case before the German-Venezuelan Mixed Claims Commission of 1903. The Venezuelan Commissioner had objected to the admissibility and effect of a certain certificate on the ground that it certified to conclusions of law rather than of fact, and that the claimant's only

¹² Opinion No. 33 (opinion separately printed for Commission) 3-5.

The Supreme Court of the United States has gone so far as to apply this principle of the freedom of action of an international tribunal in its own proceedings in dealing with cases involving international claims. Chief Justice Waite declared speaking for the Court in the case of *Frelinghuysen v. Key*:

"No technical rules of pleading, as applied to municipal tribunals, ought ever to be allowed to stand in the way of the national power to do what is right under all circumstances." 110 U.S. 63, 75 (1883). For a full discussion of this case, see *infra*, pp. 306-307.

¹³ The Statute of the Permanent Court of International Justice provides in Article 59: "The decision of the Court has no binding force except between the parties and in respect of the particular case." This rule is applicable to matters of procedure as well as to matters of substantive law. Tribunals, nevertheless, look to the practice of previous tribunals as guides in matters of procedure and evidence. Thus Commissioner Jones in his separate opinion in the *Cameron* case before the British-Mexican Claims Commission, citing the decision of the United States-Mexican General Claims Commission, in the *Parker* case (*Opinions* (1927) 35-40) in support of his conclusion on a point of evidence said: "I am not overlooking the fact that the decision of one international tribunal is not binding upon another. It is no less true, however, that the general principles relating to evidence and procedure which should guide them ought to be the same." *Decisions and Opinions*, p. 38.

proof consisted in the testimony of two witnesses who stated conclusions based upon what they alleged to have seen in Faber's books. After quoting the provisions of the Protocol requiring the Commissioners "to receive and carefully examine all evidence presented to them by the Imperial German Minister at Caracas and the Government of Venezuela," and providing that they should "be authorized to receive the declarations of claimants or their respective agents and to collect the necessary evidence," the Umpire continued:

"If the word 'evidence' as used in the protocol is to be interpreted in its usually accepted legal sense in law, namely, such testimony as is admissible under the rules of either the civil or common law, the objection of the Commissioner is well taken. It has been held, however, by a former justice of the Supreme Court of the United States, in the case of Pelletier (Moore, p. 1752), that the technical rules of the common law in respect to evidence were not adapted to the proceedings before a mixed commission, and that 'he would feel disposed to act upon whatever evidence satisfied his mind as to the actual facts.'

"Judge J. C. Bancroft Davis said in *Caldera Cases* (15 Ct. Cls. R. 546): 'In the means by which justice is to be attained the court is free from the technical rules of evidence imposed by the common law, and is permitted to ascertain truth by any method which produces *moral conviction*.'

" 'This proposition is self evident. . . .

" 'In its wider and universal sense it (evidence) embraces all means by which any alleged fact, the truth of which is submitted to examination, may be established or disproved. (1 Green, Ev., sec. 1.)

" 'International tribunals are not bound by local restraints: they always exercise great latitude in such matters (Meade's Case, 2 C. Cls. R. 271) and give to affidavits, and sometimes even to unverified statements, the force of depositions.'

" 'In deference to these decisions, and because of the character of the conclusions of fact which the consul and the witnesses erroneously substitute for copies of the papers, and because of the provisions in the protocol requiring the Commissioners to disregard objections of a technical nature, and further, because there is no doubt in the mind of the umpire as to the truth or correctness of these conclusions, which do not involve any questions of law, the umpire will accept the same as proof.'"¹⁴

¹⁴ Ralston's Report (1904) 621.

To the same effect, see *Dix case* (United States v. Venezuela), Feb. 17, 1903, Ralston's Report (1904) 46, 54-55; *Fur Seal Arbitration*, Feb. 20, 1892, (United States v. Great Britain), *Proceedings, Fur Seal Arbitration* (1895), vol. 11, pp. 6-7; *Shufeldt Claim* (United States v. Guatemala), Nov. 2, 1929,

A further reason for liberality in the treatment of evidence was set forth by the British-Mexican Claims Commission of 1926 in its opinion in the *Cameron* case, namely, the necessity of disposing of all the claims presented to the Commission:

"In signing the Convention the Governments have acknowledged that it is in the interest of both States that the claims should be disposed of once and for all. . . .

"By Article 2 of the Treaty a duty is imposed upon the Commissioners 'to examine with care and to judge with impartiality in accordance with the principles of justice and equity all claims presented.' In order to carry out the object of the treaty and the duty of the Commissioners it is necessary that this body should be equipped with more extensive powers than a domestic tribunal can enjoy so that the Commissioners can ascertain the truth in a manner which is not subject to any restriction."¹⁵

The nature of the personnel of the tribunals has exercised an influence equal with, if not greater than, the character of international judicial proceedings in the development of their liberal practice with respect to the reception of evidence. Composed of

Shufeldt Claim (1932) 852; "*R. T. Roy*" case, No. 17 (United States v. Great Britain), Aug. 18, 1910, "Answer of His Majesty's Government," p. 2, "Reply of the United States," pp. 10-11, *Pleadings and Awards* (1910), vol. 10; Helio Lobo's Report (1910) 50-55.

Mr. Justice Strong, sole Arbitrator in the *Pelletier* case, referred to in the opinion of the Umpire in the *Faber* case, discussed the question of evidence a number of times in the course of the oral proceedings:

"I do not propose, in the discharge of what I regard as my duty, to be strict in the exclusion of evidence, but I do propose to hold parties to something like an approximation to what would be regarded in all judicial systems as reliable; that is, something on which the mind might rest with satisfaction. I do not forget that this is a very old transaction, and it is not strange if a great deal of the evidence should have been lost. I do not mean to enforce the technical rules of evidence, but as at present advised I cannot see that an affidavit of the kind you have read is evidence.

"Here the rules of evidence are much more liberal than they are at common law. I know of no rule by which a certified copy is not evidence. I know no rule of international law which prevents a party giving evidence of the second degree because there is evidence of the first degree in existence. There is no rule to exclude one class of evidence because, peradventure, better evidence might be in existence. If there is such a rule, I do not know of it, and, as far as I have examined, I find, in controversies of this kind, no action under any such rule." *United States v. Haiti*, May 24, 1884, *Record of Pelletier Claim* (1885), vol. I, pp. 481-482, vol. II, p. 1391. Cf. *infra*, sec. 44.

"VIII. With reference to the admissibility of evidence, the Commission will follow the procedure of a commission of inquiry rather than the technical rules of evidence." *Final Report, Joint Commission, United States and Panama* (1920), Appendix A, Rules of Procedure, adopted Mar. 18, 1913, p. 22.

For a discussion of cases on this subject, see Ralston, *Law and Procedure* (1926) 214-215. Also see *infra*, sec. 40.

¹⁵ *Decisions and Opinions*, p. 34. In support of its conclusion the Commission cited the statement of the United States-Mexican General Claims Commission in the *Parker* case to the effect that "the greatest liberality will obtain in the admission of evidence before this Commission, with a view of discovering the whole truth with regard to each claim submitted."

trained and experienced jurists, the tribunals have been assigned the task of deciding questions of fact as well as of law, as have the courts under civil law procedure in civil cases. International practice in the admission of evidence has paralleled the civil law in its freedom from technical and restrictive rules, it being considered as in that law, that the members of the tribunals were qualified to assign a proper weight to virtually any and all evidence submitted. As was to be anticipated, since most of the rules of Anglo-American law concerning the competence, relevance and materiality of evidence have been built up around the jury, they have found no counterpart in international practice where a jury is not used. This is a factor to be kept constantly in view in considering the treatment of evidence by international tribunals.¹⁶

International tribunals, however, no matter how liberal they may be in the treatment of evidence as to matters of form, submission, and admissibility, are undoubtedly inclined to subject it to the tests which the members of the tribunal are accustomed to use in evaluating its weight in the countries from which they come. Chief Justice Nott of the United States Court of Claims stated the matter broadly in his opinion in the case of the *Schooner "Ula-lia,"* one of the French spoliation cases, when he asserted that fundamental to the rules of evidence in international tribunals was the principle "that a party shall produce the best evidence which the nature of the case admits of."¹⁷ Commissioner Nielsen declared in his concurring opinion in the *Mallen* case in the United States-Mexican General Claims Commission of 1923 that the Commission "can and must give application to well-recognized principles underlying rules of evidence and of course it must employ common sense reasoning in considering the evidential value of the things which have been submitted to it as evidence."¹⁸ Naturally the members of international tribunals give greater weight to evidence which is "legal" and "competent" according to the standards of municipal law if such evidence is available.¹⁹

¹⁶ For an elaboration of this point, see *infra*, sec. 37.

¹⁷ *Opinions in French Spoliation Cases* (1912) 411. For a full discussion of the "best evidence" rule, see *infra*, secs. 43-49.

¹⁸ *Opinions* (1927) 268.

¹⁹ *Schooner "Delight" case*, *Opinions in French Spoliation Cases* (1912) 77-78; *Alegato de Venezuela en su controversia sobre limites con Colombia* (Caracas, 1883) 32; *Pelletier case* (United States v. Haiti), May 24, 1884, Brief of the United States, April 27, 1885, *Record of the Pelletier Claim* (1885), vol. I, p. 1444. Cf. *infra*, sec. 50.

The Swiss Federal Council declared in its decision on the question of the boundary between French Guiana and Brazil, with reference to France's contention that new evidence, not responsive to the memoir, and submitted by Brazil with its second memoir, should be excluded:

"L'arbitre estime qu'il n'est pas réduit à s'en tenir aux allegations des parties et aux moyens de preuve qu'elles invoquent. Il ne s'agit pas, pour lui, de trancher un différend de droit civil, selon les voies de la procédure civile mais d'établir un fait historique; il doit rechercher la vérité par tous les moyens qui sont à sa disposition. Il ne tiendra compte des allegations des

With reference to the practice of the Permanent Court of International Justice in this respect, in a memorandum dated December 31, 1925, concerning the revision of the rules of the Court, M. Huber asserted that as the Statute did "not contain a trace of a formal and rigid system of evidence, it would be inadmissible for the Court to create such a régime through its rules." He concluded:

"The attitude taken by the Court in the Mavrommatis case seems thus absolutely to conform to the exigencies of the jurisdiction exercised by it: the Parties may present any proof that they judge useful, and the Court is entirely free to take the evidence into account to the extent that it deems it pertinent."²⁰

The liberal practice of international tribunals in the treatment of evidence appears to be in accord with the trend in modern legislation on this subject.²¹ As will appear in the ensuing pages, however, there is a need for the enforcement of certain restrictions and safeguards.²²

Section 4. Evaluation of Evidence. In the evaluation of evidence, international tribunals exercise an even greater degree of

parties et des documents produits, sur lesquels la partie adverse n'aura pas pu s'expliquer, que si leur exactitude et leur authenticité lui paraissent hors de doute." *Sentence du conseil fédéral suisse dans la question des frontières de la Guyane française et du Brésil*, du 1^{er} décembre, 1900, in *La Fontaine, Pasicrisie internationale* (1902) 570.

The Spanish Agent submitted a special argument to the United States-Spanish Mixed Claims Commission under the Convention of February 12, 1871, with reference to the genuineness, admissibility and effect as evidence of the books of the Junta Central Republica de Cuba y Puerto Rico, upon the claims of those contributing to the funds of the Junta. In it he contended that the lack of power on the part of the Commission to subpoena or punish for false swearing such persons as the secretary of the Junta constituted a reason for admitting as evidence documents not normally admissible under the laws of either of the states represented on the Commission. *The Books of the Junta Central Republicana de Cuba y Puerto Rico*. "Argument of the advocate of Spain in support of their genuineness, their admissibility as evidence, and the effect of such evidence upon the claims of those who contributed to the funds of the Junta." [Submitted in support of a motion of August 6, 1880 in the case of *Mateo Rodriguez*, No. 72, that the case be reopened to enable him to submit the Books of the Junta as newly discovered evidence, and a like motion of the same date in the *de Rivas y Lamar* case, No. 73] *Record* (1871), vol. 13. The books of the Junta were admitted by the national arbitrators in the case of *Mateo C. Rodriguez*, No. 72, Decision of January 8, 1881, *Record* (1871), vol. 15, and by Umpire Lewenhaupt in the *de Rivas y Lamar* case, No. 73, in his opinion of Feb. 22, 1883, *ibid.*

²⁰ Series D, No. 2 (add.), pp. 249, 250, translation. All translations are by the author unless otherwise indicated. M. Huber said further:

"Il résulte des considérations ci-dessus énoncées que la Cour devrait s'abstenir d'établir dans son Règlement des règles sur l'admissibilité des preuves. La Cour n'a pas encore assez d'expérience à ce sujet, et les dispositions du Statut peuvent suffire."

²¹ See Mohamed Sadek-Fahmy, *Le fait pertinent et admissible dans ses rapports avec la théorie générale des preuves comme élément probatoire en droit civil comparé*. Paris, 1923, pp. 201-202. See also Louis W. McKernan, "Special Mexican Claims," 32 A.J.I.L. 457, 462 (1938).

²² See especially *infra*, secs. 20, 37-41, 57, 100, 106, 111.

freedom than in its admission. This likewise is in accord with the trend of modern municipal legislation on the subject.²³

In the absence of express limitations in the arbitral agreement, international tribunals have generally assumed the prerogative of determining without restrictions the weight of all evidence submitted to them. The principle was embodied in the fifth paragraph of Article 15 of the *Draft Regulations for International Arbitral Procedure* drawn up by the Institute of International Law in 1875 which provided that in the absence of provisions to the contrary in the compromis, the arbitral tribunal should have the power "to decide, in its free discretion upon the interpretation of documents produced and generally upon the worth of the instruments of proof presented by the parties."²⁴

This power of the tribunal is sometimes specifically stated in the rules of procedure, but does not appear to be dependent upon such formulation.²⁵ It appears to have been generally presumed,

²³ ". . . it can be said that there are no rules, in our system of Evidence, prescribing for the jury the precise effect of any general or special class of evidence." I Wigmore's *Evidence* 227.

With the exception of a few rules according specific weight to certain written instruments, such as birth registers, courts in civil law countries are equally free to determine the value of evidence submitted to them. Edouard Louis Joseph Bonnier, *Traité théorique et pratique des preuves en droit civil et en droit criminel*. Cinquième édition, etc., par M. Ferdinand Larnaude. Paris, 1888, pp. 270-271. Carlos Lessona, *Teoría general de la prueba en derecho civil*. Translated and annotated by D. Enrique Aguilera de Paz. Second edition, Madrid, 1911-5 vols., vols. I, pp. 355-356, IV, p. 491. Sadek-Fahmy, *op. cit.* 252-258.

"Art. 286. Das Gericht hat unter Berücksichtigung des gesamten Inhalts der Verhandlungen und des Ergebnisses einer etwaigen Beweisaufnahme nach freier Überzeugung zu entscheiden, ob eine tatsächliche Behauptung für wahr oder für nicht wahr zu erachten sei. In dem Urteile sind die Gründe anzugeben, welche für die richterliche Überzeugung leitend gewesen sind.

"An gesetzliche Beweisregeln ist das Gericht nur in den durch dieses Gesetz bezeichneten Fällen gebunden." German Code of Civil Procedure (1933).

The official text of the Code may be found in the *Reichsgesetzblatt*, 1933, pt. I, No. 126, pp. 821-920.

²⁴ Scott, *Resolutions of the Institute of International Law*, New York, 1916, p. 5. For the French text, see *Annuaire de l'institut de droit international*, 1877, vol. 1, p. 131.

²⁵ United States-Mexican General Claims Commission, Sept. 8, 1923, Rules, Art. VIII (1), Mimeograph Copy, Dept. of State, Feller, *Mexican Commissions*, p. 378; Spanish-Mexican Mixed Claims Commission, Nov. 25, 1925, Rules, Art. 28, *Reglas de procedimiento* (1927) 10; United States-Panamanian General Claims Commission, July 28, 1926, Rules, Art. 23, Hunt's Report (1934) 848; Austrian-Belgian Mixed Arbitral Tribunal, Rules, Art. 48, 1 *Recueil des décisions* 177. Several other of the Mixed Arbitral Tribunals had a similar provision. See *Recueil des décisions*, vol. 1, *passim*. For a rule to the effect that "the rules of evidence as to the competency, relevancy, and effect of the same, shall be determined by the Commission in view of these regulations, the laws of the two nations and the public law," see United States-Spanish Mixed Claims Commission, Feb. 12, 1871, Rules, Art. XI, III Moore's *Arbitrations* 2170; United States-French Mixed Claims Commission, Jan. 15, 1880, Rules, Art. XVI, *ibid.* 2216; United States-Venezuelan Mixed Claims Commission, Dec. 5, 1885, Rules, Art. XV, *ibid.* 2228; United States-

in fact, that the power is embraced in the authority of the tribunal to decide the controversies submitted to it, for it is not customary to include any provision relative to the matter in the arbitral agreement. Strictly speaking, it is more a matter of substantive law than of procedure.

The general principle that the probative force of the evidence presented is for the tribunal to determine has received frequent statement.²⁶ Tribunals have not hesitated to exercise this power in refusing to attach any probative force to evidence of an unconvincing character which they may have been compelled by the arbitral agreement to admit.²⁷ Thus having admitted unconvincing secondary evidence of nationality, they may refuse to accept it as sufficient proof of the essential jurisdictional fact of the national character of the claim.²⁸ Or tribunals may refuse to base an award on evidence taken long after the event, if uncorroborated by other evidence.²⁹ On the other hand, the tribunal is free to attach great weight to contemporary evidence if it bears intrinsic indications of veracity, even though given by an interested party.³⁰ Tribunals have in application of this rule attached such weight to the judgments of municipal courts offered in evidence as the content of such judgments seemed to warrant in the establishment

Chilean Mixed Claims Commission, Aug. 7, 1892, Rules, Art. XV, *ibid.* 2234.

The rules of procedure of the two Mexican claims commissions cited above and of the other Mexican commissions are reprinted in Feller, *Mexican Commissions*, pp. 321-548.

²⁶ *Evertsz* case (Netherlands v. Venezuela), Feb. 28, 1903, Ralston's Report (1904), 905; *Rosario Nitrate Co. Ltd.*, case (Gt. Britain v. Chile), Sept. 26, 1893, *Reclamaciones presentadas al Tribunal anglo-chileno* (1894-1896), vol. I, p. 342; *Parker* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1927) 35, 37; *Cameron* case (Gt. Britain v. Mexico), Nov. 19, 1926, *Decisions and Opinions*, pp. 33, 34; *Pinson* case (France v. Mexico), Sept. 25, 1924, *Jurisprudence de la Commission franco-mexicaine des réclamations*, pp. 1, 94; *Andresen* case (Germany v. Mexico), March 16, 1925, cited in Feller, *Mexican Commissions*, p. 259 (unpublished); *Goeldner* case, *ibid.*, 27 A.J.I.L. 76 (1933); *Barcena* case (Spain v. Mexico), Sept. 25, 1925, cited in Feller, *op. cit.* 259 (unpublished).

²⁷ *Bottaro* case (Italy v. Venezuela), Feb. 13, 1903, Ralston's Report (1904) 768; *Kummerow et al.* case (Germany v. Venezuela), Feb. 13, 1903, Ralston's Report (1904) 526, 559.

²⁸ *Pinson* case (France v. Mexico), Sept. 25, 1924, *Jurisprudence de la Commission franco-mexicaine des réclamations*, pp. 1, 37; *Carmichael* case (Gt. Britain v. Mexico), Nov. 19, 1926, *Further Decisions and Opinions*, pp. 45, 47-48. For a discussion of the "best evidence rule" with reference to proof of nationality, see *infra*, secs. 47, 48.

²⁹ *Gastelum* case (United States v. Mexico), July 4, 1868, VI ms. *Opinions* 303, 353; *Mossman* case, *ibid.*, IV ms. *Opinions* 581-582; *Jaroslowsky* case, *ibid.*, III ms. *Opinions* 65-67; *Lasry* case (United States v. Venezuela), Feb. 17, 1903, Ralston's Report (1904) 37-38; *Studer* case (United States v. Gt. Britain), Aug. 18, 1910, Nielsen's Report (1926) 548, 552; *Brig "Maria,"* United States Court of Claims, *Opinions in French Spoliation Cases* (1912) 492; *Manzo* case (United States v. Panama), July 28, 1926, Hunt's Report (1934) 684, 685.

³⁰ *Solari* case (United States v. Mexico), July 4, 1868, III ms. *Opinions* 197, IV ms. *Opinions* 605; *Scrope* case (Gt. Britain v. Mexico), Nov. 19, 1926, *Further Decisions and Opinions*, pp. 270-271; *Clapham* case, *ibid.* 161-162.

of the facts found in them.³¹ However, in the exercise of this freedom of judgment tribunals may at times attach undue weight to testimony because of the appearance of veracity and integrity flowing from the general reputation or position of the witnesses.³²

It is important in this respect to distinguish clearly the question of the evaluation of evidence from that of its admission. A provision requiring the indiscriminate admission of evidence regardless of its character does not necessarily affect the right of the tribunal to apply whatever tests it sees fit in evaluating it.³³ The Umpire declared in his opinion in the *Lozano* case before the Spanish-Venezuelan Mixed Claims Commission of 1903:

" . . . the question of admissibility of the proof presented shall not prejudice its efficacy, which shall be appreciated by the commissioners or the umpire, as the case may be, as they may determine to proceed in accordance with absolute equity without regard to objections of a technical nature, or provisions of a local legislature, as prescribed as a binding rule."³⁴

It has been persuasively argued that the very fact of liberality in the admission of evidence "makes it all the more incumbent upon the parties to observe and upon the Tribunal to apply those laws of logic, those principles of general jurisprudence, and those general assumptions regarding the conduct of men which are common to every system of law."³⁵

³¹ *The Newchwang* case (United States v. Gt. Britain), Aug. 18, 1910, Nielsen's Report (1926) 414, 416, *Pleadings and Awards* (1910) vol. 11, Claim No. 21, "Memorial of Gt. Britain," pp. 2-3, "Answer of the United States," pp. 10-11, "Memorandum of the Oral Argument of the United States," pp. 2-4; *The David J. Adams* case, *Pleadings and Awards* (1910) vol. 10, Claim No. 18, "Short hand notes of the Proceedings," p. 181; *Charles and Edmond Georgen v. Nagle and Endlé*, 3 *Recueil des décisions* 334 (1924), Franco-German Mixed Arbitral Tribunal; *Buzzi* case (United States v. Spain), Feb. 12, 1871, *Record, Opinions, and Decisions* (1871), No. 22, pp. 4-6. See also *Chattin* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1927) 422, 436. For discussion of effect of municipal decrees in cases involving nationality acquired by naturalization, see *infra*, sec. 47.

³² For example, in the *La Abra Silver Mining Co.* case (United States v. Mexico), July 4, 1868, in which the award was subsequently renounced by the United States when it was proved to have been based upon forged evidence, the Umpire declared in the course of his opinion:

"The evidence on the part of the claimants is, in the umpire's opinion of great weight; the witnesses are for the most part highly respectable and men of intelligence, and their testimony bears the impress of truth." House Ex. Doc. No. 103, 48 Cong. 1st. sess., p. 42. For a further discussion of this case, see *infra*, sec. 103.

³³ See Feller, *Mexican Commissions*, p. 260.

³⁴ Ralston's Report (1904) 931. See also *Noyes* case (United States v. Panama), July 28, 1926, "Memorandum of Panama submitted in Lieu of Oral Argument," Hunt's Report (1934) 184-186.

³⁵ *The Norwegian Claims* case (United States v. Norway), June 30, 1921, *Counter Case of the United States* (Washington, 1922) 4. See also *Thorndike* case (United States v. Chile), Aug. 7, 1892, *Minutes of the Proceedings* (1894) 173; British Guiana-Venezuela Boundary Arbitration, Feb. 2, 1897, *Proceedings* (1899), vol. VIII, p. 2351. For argument concerning the weight of the Memorial as evidence in a claims case, see *Ward* case (United States v. Gt. Britain), May 8, 1871, *Memorials, Demurrers*, etc. (1871), vol. 1, No. 1.

The rule of the free evaluation of evidence has been applied by the Permanent Court of International Justice, although it is not set forth either in the Statute or in the Rules. Judge Huber said in his Memorandum of December 31, 1925, quoted above, that while the parties "may present any proof that they judge useful . . . the Court is entirely free to take the evidence into account to the extent that it deems it pertinent."³⁶

In the case concerning *German Interests in Polish Upper Silesia*, the Court declared in its judgment that it was "entirely free to estimate the value of statements made by the Parties." In applying this rule it accepted the uncontested statement made in the applicant's (Prince Lichnowsky) case, and his declaration opting for German nationality as sufficient proof of the Prince's nationality. This was done over the demand of Poland that these assertions be substantiated by documentary proof.³⁷ In its judgment on the question of jurisdiction in the *Chorzow Factory* case, the Court asserted that it could not take account of declarations, admissions, or proposals made by the Parties in direct negotiations, the negotiations having led to no agreement, although evidence of these matters had been admitted during the proceedings.³⁸

Some effort has been made to impose one restrictive rule of evaluation on international tribunals, that is the old Roman law rule *Testis unus, testis nullus*.³⁹ In accord with the practice in modern municipal procedure, such limitation appears to have been universally rejected.⁴⁰ Whether the testimony of a single witness will be accepted as sufficient is a question for determination by the tribunal on the basis of its estimate of his credibility and of the merit of his testimony.

Section 5. Difficulties in Obtaining, Preparing and Evaluating Evidence. Probably the most compelling reason for the refusal of international tribunals to apply restrictive rules in admitting and

³⁶ Ser. D, No. 2 (add.), pp. 249, 250. In its Judgment in the case of the *Appeal from Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal*, in accepting certain documents submitted during the oral proceedings and objected to by the Hungarian Agent, the Court said this action was taken "subject to the usual reservation respecting the value it might decide to attach to them." Series A/B, No. 61, pp. 214-215.

³⁷ Series A, No. 7, pp. 72-73.

³⁸ Series A, No. 9, p. 19.

³⁹ *Johnson et al.* case (United States v. Mexico), July 4, 1868, III ms. *Opinions* 33, 45, 46 (Opinion of Commissioner Palacio. Award of \$20,000 by Umpire Thornton, III ms. *Opinions* 333); *Treadwell and Co.* case, *ibid.*, VII ms. *Opinions* 383-384 (Reference to "testimony of one witness," but claim dismissed on other grounds); *Wilkinson* case, *ibid.*, III ms. *Opinions* 410-411 (Opinion of Commissioner Palacio. Claim disallowed by Umpire Thornton for want of proof of nationality); *Johnson* case (United States v. Peru), Dec. 4, 1868, ms. *Proceedings and Awards* (1868) 394 (Opinion of Commissioner Cisneros).

⁴⁰ IV Wigmore's *Evidence* 308-311; 23 *Corpus Juris* 54; *Bonnier, op. cit.* 263.

evaluating evidence has been the great difficulties involved in obtaining and preparing it. The constantly recurring complaint of tribunal after tribunal is that they are compelled to act upon the basis of meager, incomplete and unsatisfactory evidence. Agents and counsel have not infrequently been faced with nearly insuperable obstacles in the collection and preparation of evidence. This is especially true in the case of claims commissions, which have to deal with complex questions of fact relating to the claims of hundreds or even thousands of individuals, but the trouble is by no means confined to them. The difficulties in obtaining accurate and authentic evidence is the bane of the work of boundary arbitration tribunals.⁴¹ In other types of cases, the difficulties which may arise are illustrated by the obstacles which confronted the Government of Czechoslovakia, in obtaining evidence for the proceedings before the Permanent Court of International Justice in the case of *Appeals from certain judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal*. The Court could obtain an idea of the difficulties which had handicapped the representatives of the Czechoslovak Government in the search for evidence, it was declared, by examining the documents annexed to the appellant's Memoir, since the papers of an auxiliary character related to them could not be discovered, and others of primary importance could not be obtained. The Czechoslovak Government had been forced to request the Court to invite the Royal Hungarian Government to produce certain important documents which had only lately been discovered in certain libraries or which remained in the hands of the latter Government.⁴²

Many factors contribute to the difficulties facing counsel and tribunals in obtaining and preparing evidence of which those hereinafter discussed seem to have received most frequent attention in the records of arbitral proceedings.

(1) The long period of time frequently elapsing between the events giving rise to the dispute and the submission of the dispute to arbitration is perhaps the cardinal cause of difficulty in this respect. For various reasons, Governments are slow to submit questions to arbitral settlement.⁴³ The result of the usual delay is that evidence which might easily have been obtained at the time is lost. Possible witnesses die, or it becomes necessary to take their statements *ex parte* long after the event. Records are lost, and can not be replaced, or must be replaced by copies of doubtful authenticity. Counsel may find it difficult to piece together a story which would have been familiar to their predecessors of a previous generation. The French Spoliation Claims arising out of seizures

⁴¹ See *infra*, secs. 49, 87, for a discussion of maps as evidence.

⁴² Reply of the Czechoslovak Government, Series C, No. 72, p. 510.

⁴³ In general the cases submitted to the Permanent Court of International Justice have represented an encouraging exception to this practice.

made by the French Government at the turn of the eighteenth century were submitted to the Court of Claims nearly a century later. Instances need not be multiplied. Typical is the experience recounted by the Agent and Counsel of the United States before the United States-French Mixed Claims Commission which adjudicated Civil War Claims:

"In a majority of cases, . . . the defense consisted in large part of oral testimony, given sometimes by neighbors, sometimes by negroes who were slaves upon the plantations where the events occurred, and sometimes by officers of the army who had knowledge of the transactions to which the claims related. The time that had elapsed, and the defects of memory, were serious difficulties, which, in some cases, could not be overcome. When the names of officers were obtained who were supposed to have knowledge of the transactions, investigation and inquiry often resulted in information that the officers had died or that their residences were unknown. The examinations and inquiries incident to the defense of these cases led to delay and to the expenditure of considerable sums of money."⁴⁴

(2) The distances which must be traversed in obtaining the necessary evidence are not infrequently very great. In such cases, reliance must be placed largely, if not entirely, on evidence taken *ex parte* by the interested party, with no possibility of checking its accuracy and credibility at the time of the proceedings. This is a primary cause for the rare use of oral testimony in such proceedings. The Spanish Treaty Claims Commission furnished a very good illustration of this type of case. Most of the claims arose out of events occurring in Cuba, and the evidence had to be obtained there and in Spain. The Commission was established in 1901 and, as in September, 1904, no return had been made on any of the letters rogatory already issued, a special agent was sent to Spain to expedite their execution. In addition to obtaining the execution of the letters, the special agent obtained from the Spanish Archives 10,000 typewritten pages of evidence.⁴⁵

(3) The conditions of written records, resulting both from their careless and faulty preparation and their mutilation and de-

⁴⁴ Boutwell's Report (1884) 2-3. See also Louis W. McKernan, "Special Mexican Claims," 32 A.J.I.L. 457, 462-463 (1938).

⁴⁵ For an account of the difficulties involved, see Brown's Final Report (1910) 8-11.

The American Agency of the United States-German Mixed Claims Commission was faced with a somewhat similar situation in that a very considerable part of the evidence essential to the proper proof of a large number of claims based upon interests in German estates had to be obtained in Germany. The difficulties presented and the procedure followed in obtaining the evidence is described at length by the American Agent in his Report. Bonynges's Report (1934) 143-144.

struction, is another source of serious trouble. A very good example of faulty records is to be found in the proceedings of the Nicaraguan Mixed Claims Commission, established under the Executive Decree of May 17, 1911, technically a domestic commission, but essentially an international tribunal in the character of its proceedings. It adjudicated something over 7,900 claims, and its trials and tribulations in matters of evidence are graphically pictured by its President in his report. Over 7,800 of the claims arose out of wars, and in practically all of them the evidence consisted either of receipts given by the authorities, or of depositions taken before local magistrates. The Commission found that the authorities had been recklessly negligent in the issuance of receipts. Unfortunately the depositions proved even less reliable. The representatives of the Government largely ignored the notifications of the taking of the depositions, failed to appear to cross question the witnesses, and "took no interest in ascertaining whether the witness had testified the truth," and "afterwards either permitted the time for filing their report to pass or gave a favorable report, however exaggerated the claim may have been." In the case of evidence prepared under the procedure known in Nicaraguan law as investigations for "perpetual memory," the "questions asked of the witnesses were exceedingly vague and the witnesses merely answered affirmatively without giving any explanation." Such evidence, the President declared, "was far from convincing the Commission of the truth of the matters alleged by the claimant."⁴⁶

(4) A difficulty peculiar to claims commissions is the notorious negligence of claimants in furnishing evidence to substantiate their claims. Counsel must of necessity rely largely on the claimants in obtaining a very large part of the necessary evidence, partly because they have access to the evidence, and partly because of the limited time available for the preparation of cases. The extent to which such negligence may be carried cannot be better portrayed than by taking a case in which the claimants themselves were responsible for presenting their cases, that of the *Bluefields Fruit and Steamship Company* before the Nicaraguan Mixed

⁴⁶ Schoenrich's Report (1915) 59-60. The United States-Mexican Mixed Claims Commission of 1868 frequently complained of the indiscriminate way in which cases had been submitted to them without any reference to the condition or character of the evidence. In the *Laurent* case, Commissioner Wadsworth said the labors of the Commission had been "unnecessarily and greatly increased" by the way in which the "dusty records of the State Department" had "been emptied on this [the] Commission." II ms. *Opinions* 395. See also *Conkling* case, IV ms. *Opinions* 364-365; *Mansfield* case, II ms. *Opinions* 403; *San Marcial Gold and Silver Mining Co.* case, VI ms. *Opinions* 518-519; *Gallaher* case, VI ms. *Opinions* 520. Fortunately present practice represents a great advance over the practice apparently followed before this Commission.

Claims Commission, previously mentioned. In the course of its opinion the Commission said:

"The plaintiff company has shown supreme indifference with respect to these rules [of procedure]. It has filed its pleading and its evidence in the form and at the times which it pleased. . . . It has been especially negligent with respect to the presentation of its proofs. . . . According to the rules of the Commission the proofs in support of claims should be filed with the memorial or within one month after the filing thereof, and the evidence in rejoinder, together with the rejoinder.

The plaintiff company filed its memorial and a part of its evidence on Jan. 24, 1913, more evidence on Mar. 25, 1913, more evidence on May 27, 1913, more evidence with its rejoinder Feb. 16, 1914, more evidence on June 4, 1914, more evidence on June 8, 1914, more evidence on June 27, 1914, when the Government was no longer able to present counter-evidence, and it even asked permission to present more evidence after the hearing when it would be impossible for the Government to file counter-evidence or to make any observation whatever.

". . . Furthermore, in general, no original documents are presented, the copies filed are not legally authenticated, and the depositions of witnesses are also not valid under the rules of the Commission and the laws of Nicaragua."⁴⁷

⁴⁷ Case No. 5136, Judg. No. 7903, XVII ms. *Opinions*, Department of State (1915) 9, 11-12.

In its opinion in the *Mining Exploration Company* case, the same Commission said with reference to the evidence offered by the claimant:

"As evidence in support of its claim the claimant presented two bags and two suit-cases ('dos balijas y dos maletas') containing documents, books, maps, accounts, photographs and reports. None of the evidence is in printed form as required by the rules of the Commission. The documents and maps are in some confusion and many of them seem to refer to mines and mining claims ('pertenencias') outside of those within the concession of the Mining Exploration Company, being properties which had been offered to be sold to said Company. In its present state, very little of such evidence would be accepted by the ordinary courts. Most of the reports and other documents are simply copies, bearing no signature whatever, much less sworn to." Case No. 5003, Judg. No. 7907, *ibid.* 4.

"In a large number of cases the claimant, either through inability or indifference, failed to furnish evidence that would justify the further prosecution of the claim by the United States. In order to meet this condition, Rule XIII was adopted by the Commission.

"The American Agency, under this rule, sent notices as provided by the rule to many hundreds of claimants. In any case in which the claimant gave satisfactory reasons for the delay in furnishing the evidence requested, the time for supplying such evidence was extended.

"It was only in cases in which the claimant wholly failed to furnish the evidence required, or to give an explanation for the failure, after he had been fully advised regarding the issues upon which additional evidence was necessary in order to bring the claim within the jurisdiction of the Commission, and he had been given ample opportunity to furnish the same, that such claims were submitted to the Commission for dismissal under the rule. After the dismissal, if a claimant furnished the evidence required and gave any reasonable explanation for his failure to do so within the time required

(5) The complex conditions giving rise to the conflicting claims submitted to arbitration are in themselves a fruitful source of difficulty in obtaining needed evidence. Anyone who has participated in the preparation of a case in a boundary dispute can testify to the accuracy of this statement. Cases arising out of civil or international war are another example, such as the Alabama Claims. Hotly contested questions of vital national interest such as the *North Atlantic Fisheries* case produce records of unbelievable complexity.

(6) One further difficulty may be noted, that is, the problem confronting international tribunals in evaluating evidence of a character resulting from conditions such as those just described. The difficulty of applying normal standards in weighing such evidence is obvious, and the danger in not applying them will become so from an examination of the experience and practice of tribunals recorded in this study. Judges of international tribunals have too frequently sought to escape from this dilemma, it is to be feared, by admitting all evidence offered and then declining to reveal what use was made of it in reaching a decision. This is hardly occasion for surprise, however, in view of the volume and character of the evidence they have to sift in the short time usually accorded them by Governments impatient for a decision after having waited a generation to submit the case to adjudication. The matter is epitomized by the British and American Commissioners in their opinions in the *Hudson's Bay Company* case. Pointing out that they had examined 170 witnesses from every part of the continent and in every possible sphere of life, and that the evidence and documents covered over 3,500 printed pages, the British Commissioner declared:

"The number and character of these witnesses; their means of information; their disposition to view the claims favorably or the reverse; the grounds they assign in support of their opinions; the elements of value on which each relies in support of his opinion, have all to be weighed and often with reference to facts themselves controverted. By no process of reasoning can I satisfy my mind that I ought to fix on a particular sum [as the amount of the indemnity], above or below which, within a reasonable range, there would be error in going."

Speaking on the same point, the American Commissioner confessed that he had encountered serious embarrassments in determining the amount of the indemnity, since "from a mere trifle on the one side, all the way to the enormous sum demanded in the

by the notice, the American Agent presented a petition to the Commission praying to have the order of dismissal vacated and the claim presented to the Commission for determination on its merits. Such petitions were granted with few exceptions, and in those cases there were facts which justified the denial of the petitions." Bonyng's Report (1934) 10.

Claimant's memorial, on the other, almost any sum could be supported by testimony, free from criticism, affecting either the fidelity or the intelligence of the witnesses."⁴⁸

Section 6. Amenability of International Tribunals to the Local Law of Evidence. In opposition to the insistence of international tribunals that they are not required to observe strict rules of evidence, counsel have frequently contended that the tribunal is bound to apply to evidence the laws of the litigating states. The tribunal, it is argued, being the creature of the states that have created it is in a position similar to the municipal courts of those states: it must in considering matters relating to evidence follow the same rules that a municipal court would be required to apply in like circumstances.

The usual contention is that the laws of all the states parties to the arbitration must be taken into account in determining the rules of evidence. Thus the American Agent in his brief in the case of *Sarah Ward* before the United States-British Mixed Claims Commission of 1871, referring to the provision in Article XIII concerning the evidence the Commission was "bound to receive and consider,"⁴⁹ asserted that it must be "construed so as to carry out the manifest intention and object of the high contracting parties."⁵⁰ The Commission made an award in favor of Great Britain of \$620.44 "without expressing any opinion on the effect to be given to the evidence of Thomas and Sarah Ward," thus challenged by the American Agent.⁵¹

⁴⁸ United States v. Great Britain, July 1, 1863, I Moore's *Arbitrations*, 250, 255, 261-262.

⁴⁹ "The Commissioners shall . . . be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments in support of or in answer to, any claim." Art. XIII, Treaty of May 8, 1871, I Malloy's *Treaties* 706.

⁵⁰ The Agent contended further: "The clause in question was most evidently intended to cover first, such proofs and evidence as should have been once fully presented to the proper department of either Government for diplomatic, administrative, or judicial action; and, second, such documents or statements now first presented on the part of either party, as by the ordinary rules of evidence of the two countries, or perhaps of either of them, of the most liberal and equitable interpretation, may be considered admissible as evidence, or carrying any weight to the minds of a judicial tribunal."

In his argument he added: "Two highly civilized nations, adhering to substantially identical principles of judicial proceedings and rules of evidence, could never have intended by solemn agreement to make that evidence which the rules of all the judicial tribunals of each of them declare to be no evidence." "Brief for the United States," p. 4, "Argument for the United States on final submission," p. 3, *Memorials, Demurrers, etc.* (1871), vol. 1, No. 1.

⁵¹ *Ibid.*, "Award," p. 1. The Commissioners asserted: ". . . the receipts and vouchers given by acknowledged officers of the army at the time show that the cotton was taken from the claimant for the use of the United States. This we think sufficient, in the absence of all countervailing proof, to show the taking by the United States."

"It is submitted that except as otherwise provided for in the protocol the law and rules of evidence governing this matter [certification of docu-

A similar argument was made by the Mexican Agent before the United States-Mexican General Claims Commission of 1923 in the *Parker* case. The Commission denied its validity, announcing for the future guidance of the respective Agents that "however appropriate" the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico "might be" as applied to the conduct of trials in their municipal courts, they had "no place in regulating the admissibility of and in the weighing of evidence" before the Commission. It added:

"There are many reasons why such technical rules have no application here, among them being that the Commission is without power to summon witnesses or issue processes for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as 'universal principles of law' or 'the general theory of law,' and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted."⁵²

Each of the special Mexican Commissions set up to adjudicate claims arising out of the revolutions adopted a position in accord with this view, which seems sound in principle and supported by practice.⁵³

ments] are to be decided by the *lex fori*." *Shufeldt* case (United States v. Guatemala), Nov. 2, 1929, Final Argument of Guatemala, *Shufeldt Claim* (1932) 795.

⁵² *Opinions* (1927) 38-39. In his separate opinion in the *Cameron* case before the British-Mexican Claims Commission, Commissioner Jones, after citing the opinion in the *Parker* case, declared:

"The substance of the judgment is that an international commission cannot be governed by rules of evidence borrowed from municipal procedure. This view is fully established by the conclusive reasons set out therein. In my judgment the reasons which are there advanced ought to be adopted without qualification both by this and every other international commission." *Decisions and Opinions*, p. 38.

⁵³ Feller, *Mexican Commissions*, pp. 258-259, citing the following cases:

"I hold as, a fundamental principle of procedure in regard to evidence, the complete liberty of the French-Mexican Commission to admit such kinds of proof as it shall deem it desirable to admit and to evaluate such evidence freely in each particular case, without being bound in any respect by the legal provisions in force in Mexico. This being the case, I agree, without any reservation, with the unanimous opinion of the United States-Mexican General Claims Commission [in the *Parker* case]. Presiding Commissioner Verzijl in *Republic française (George Pinson) v. Etats Unis mexicains*, *Jurisprudence de la Commission franco-mexicaine des réclamations*, at p. 94.

"As far as the kind of evidence is concerned, our Commission is not bound by any rule of the Convention and . . . it has the greatest freedom of appreciation in this regard; . . . it considers the testimony, declarations and expert opinions in the record as amply sufficient to establish the nature and the importance of the losses of which claimants complain." Case of the *Compania Azucarera del Paraiso Novello*, reorganized French-Mexican Commission, Decision No. 70 (unpublished).

"In accordance with the provisions of Art. 25 of the Rules, the Com-

Counsel have in some instances gone so far as to contend that the evidence presented to the tribunal must conform to the requirements of the law of the state in which it was taken. Feller says that in a few cases before the special Mexican commissions the Mexican Agents objected to the admission of documents because they had not been authenticated in accordance with the requirements of Mexican law, but that the Commissions overruled such objection in every case.⁵⁴ The Umpire of the British-Venezuelan Mixed Claims Commission under the convention of November 15, 1869, rejected the contention of the Venezuelan Commissioner that evidence in order to be admissible, must conform to Venezuelan law. He held that the Commission was not bound by Venezuelan law with respect either to matters of procedure or of substance, saying:

"The Parties who are free to dictate the rules by which the arbitrators are to be governed in their judgments have stipulated nothing in this respect. They have tacitly given the Commission full power to determine the merits of the claims in law and in equity. Free to reject those of which

mission will receive and consider all declarations, documents and other written evidence presented by the agents; consequently, the evaluation of these documents, declarations and other evidence is subject to the judgment of the Commission in every case, without subjection to special rules of procedure.' Republic Alemana (Juan Andresen) v. Estados Unidos Mexicanos, German-Mexican Commission, Decision No. 17 (unpublished).

"... the appreciation of the evidence and of the facts lies completely within the judgment of the Commissioners, who are obliged to account only to their consciences.' Case of Santos Barcena, Spanish-Mexican Commission, Decision No. 1 (unpublished)."

⁵⁴ *Ibid.* 260, citing the following cases: German-Mexican Commission: Republic Alemana (Rademacher, Muller y Cia., Sucs., en Liquidacion) v. Estados Unidos Mexicanos, Decision No. 25 (unpublished); Republic Alemana (Max Muller) v. Estados Unidos Mexicanos, Decision No. 37 (unpublished); Case of Guillermo Buckenhofer, Decision No. 5 (unpublished); French-Mexican Commission: Republic française (George Pinson) v. Etats-Unis mexicains, Jurisprudence de la Commission franco-mexicaine des reclamations, p. 1, at 98 (refused to pass on question).

In the proceedings in the *Martin* case before the United States-Mexican Mixed Claims Commission of 1868, the Mexican Agent objected to the memorial of the claimant on the ground that it was defective because verified before a British Vice-Consul, and not before an American or Mexican officer. Commissioner Palacio said in his opinion for the Commission:

"The Commission does not think that said circumstances makes the verification defective or imperfect: because for the validity of the same it is only required that the act should have been performed by a public functionary, either judicial, diplomatic, or consular, entitled to full credit, without distinction of any kind as to his nationality. This Commission is deemed an International Court, and as such it owes the same faith and the same regards to all the legitimate authorities of the civilized world. The only difference which can exist consists in that it will be more difficult in some cases than in others, to prove the existence and official capacity of said functionaries, and the authenticity of their acts. But while said capacity and authenticity are not doubtful, the Commission will not consider the value of a document may be injured on account of the Nationality of the public officer subscribing the same, provided he is competent at the place in which he acts as such." I ms. *Opinions*, 70.

the evidence, regular according to Venezuelan law, they deem insufficient, the Commissioners may none the less admit those which they consider to be well founded, despite a failure to observe local procedure. That is, international judges, acting within the limits of the compromise, according to the law of nations, . . . are not bound by the unilateral prescriptions of one of the parties."⁵⁵

It must be noted, however, that in one or two instances a different rule has been applied. The United States-Chilean Mixed Claims Commission of 1892 provided in Rule XV of its rules of procedure that as to "the competency, relevancy, and effect," of the evidence the rules should "be determined by the Commission with reference to the Convention under which it is created, *the laws of the two nations*, the public law, and these [rules of procedure]." ⁵⁶ [Italics added.] The Act of January 20, 1885, conferring upon the Court of Claims jurisdiction to "report all such conclusions of fact and law as in their judgment may affect the liability of the United States" with respect to the French Spoliation Claims, provided in section 3 that it should "receive all suitable testimony on oath or affirmation, and all other proper evidence, historic and documentary, concerning the same," and that it should "decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same, . . ." ⁵⁷ In the case of the "*Queen*" a claim of the Kingdom of Sweden and Norway for damages suffered in a collision between the Brazilian ship "*Para*" and the Norwegian ship "*Queen*," the Arbitrator in his Award of March 26, 1873, rejected the claim partly on the ground that some of the evidence submitted by Sweden did not conform in its essential parts "to the formalities prescribed by the law governing documents of this nature," and that other parts of it were not drawn "in conformity with the provisions of Norwegian law." ⁵⁸

⁵⁵ II Lapradelle and Politis, 537-538, translation. Accord: *Hill* case (United States v. Peru), Dec. 4, 1868, ms. *Proceedings and Awards* (1868) 357-359; *Johnson* case, *ibid.*, 377, 388.

"So in the Brazilian-Bolivian Arbitral Tribunal evidence of a documentary character taken in accordance with the local laws as to depositions was received for whatever it was worth in the opinion of the commission, it being recognized that documents conforming to the prescriptions of the legislation of the state in which they were drawn up were ordinarily admitted in the ordinary court and therefore must be admitted before an arbitral tribunal, an exclusive procedure not being determined upon." Ralston, *Law and Procedure* (1926) 102.

⁵⁶ *Minutes of Proceedings* (1894) 24.

⁵⁷ 23 Stat. 283.

⁵⁸ II Lapradelle and Politis, *Recueil*, 708-709. The documents referred to were the declaration concerning the accident giving rise to the claim, entered in the journal of the *Queen*, and the protest made by the captain in the port of Asuncion.

SOURCES OF THE RULES OF EVIDENCE

Section 7. The Creation of the Tribunal. International judicial proceedings are unique in that the parties create the tribunal before which their case is to be tried and select its judges. The nature of the authority of the tribunal and the extent of its jurisdiction are defined and fixed by the parties. Finally, the tribunal is dependent upon the parties for the execution of its judgment. It is the consent of the parties that gives life to the tribunal, and it is only through their consent that practical effect can be given to the tribunal's decisions. To borrow a phrase from Chief Justice Marshall, the very basis for international judicial proceedings "must be traced up to the consent of the nation itself."⁵⁹ Having once given their consent, however, the parties are legally obligated to comply with the decisions of the tribunals to which they have submitted their disputes. Furthermore, they are liable for any damages that may result from a failure to heed such decisions, provided that the tribunals have acted within the scope of the authority conferred upon them in the instrument of their creation.⁶⁰ Likewise the parties are bound to follow the rules of the tribunal in matters of procedure.

International judicial proceedings are further unique in that a new tribunal is set up *ad hoc* for the trial of each new dispute. The Permanent Court of International Justice is at present the only exception to this rule. With the exception of proceedings before the Permanent Court, therefore, new rules of procedure must be drawn up for each tribunal that is established.⁶¹ In the arbitral agreement creating the tribunal, the question to be decided must be stated, the jurisdiction of the tribunal defined, and the extent of its power in matters of procedure, including evidence, must be delimited. The Permanent Court has an established set of rules of procedure, the authority of which every party submitting a dispute to the Court recognizes, and the general power of the Court is defined in its statute.

⁵⁹ *The Schooner Exchange v. McFaddon and Others*, 7 Cranch 116, 136 (1812).

⁶⁰ For an extended analysis and exposition of the essential judicial character of international arbitral procedure and the legal and binding character of arbitral awards, see Moore's "Notes on the Historical and Legal Phases of the Adjudication of International Disputes," in his *International Adjudications*, vol. 1, pp. xv, xxxvi-lxxviii.

⁶¹ Two permanent joint commissions have been established by the United States, the International Joint Commission with Canada, and the International Boundary Commission with Mexico. To a certain extent the code of arbitral procedure embodied in the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes also represent an exception to the statement in the text. They have been used in their entirety or in a modified form in a number of the arbitrations conducted under those conventions. See *infra*, pp. 27-28.

It is of primary importance to keep in mind these unique features of international judicial proceedings in examining the rules of evidence applied by international tribunals. Rules drawn from the general practice of these tribunals can be generalized only with caution. It is essential at all times to remember that, with the exception of litigation before the Permanent Court of International Justice, there are few, if any, limits on the power of governments to prescribe in a given case, any rules of evidence that they see fit. Whether a tribunal would consent to be governed by arbitrary rules of evidence, contrary to accepted practice, is a question to be considered in the light of the uniformity of that practice revealed in the following pages. If it refused, however, it would have no choice but to refuse to accept jurisdiction in the premises.

Section 8. Rules in the Arbitral Agreement. Every international tribunal is a court of strictly limited jurisdiction, unless perchance the agreement accords to it unlimited authority. The extent of the authority of such tribunals, both as to matters of substance and of procedure, is to be determined primarily, therefore, by reference to the arbitral agreements creating them. This is as true with reference to evidence as to all other matters. Consequently, it may be a cause for some surprise to find arbitral agreements in general very sparing in the statement of rules concerning evidence. Such rules as are included are stated in most instances in broad outline, the elaboration of specific regulations being left to the tribunal, sometimes expressly, but more generally by tacit implication.

In some instances the arbitral agreement accords practically unlimited discretion to the tribunal in the treatment of evidence. Thus the agreement of August 3, 1891, between the United States, Great Britain, and Portugal in the *Delagoa Bay* case provided in Article IV that the tribunal might "order all probatory processes (proofs, expert valuations, etc.) which it shall think necessary."⁶² The same article provided that after the exchange of any written documents submitted, the tribunal should "meet again for the purpose of deciding upon the order of proofs, and, if there should be occasion for it, upon the subject of expert valuations." The agreement of May 7, 1903, between Germany and Venezuela in the *Venezuelan Preferential* case accorded equally broad discretion to the tribunal to be created under Article 3, by providing in Article 2: "The facts on which shall depend the decision of the questions stated in Article 1 shall be ascertained in such manner as the tribunal may determine."⁶³ Some agreements such as the Agree-

⁶² II Moore's *Arbitrations* 1877.

⁶³ *The Hague Court Reports* (1916) 63. This was subject however to the provision in Article 4 that except as otherwise provided procedure should "be regulated by the Convention of the Hague of July 29, 1899."

ment of June 30, 1921, between the United States and Norway provide only that each party shall file its written pleadings within specified periods of time, "together with the documentary evidence upon which it relies."⁶⁴

Where more detailed provisions are included in the arbitral agreement they fall, in general, into the following categories:

1. The evidence which the tribunal shall be bound to receive and consider.
2. Limitation to governments of the right to submit evidence.
3. Right of discovery with reference to documents cited and not produced.
4. The admission and consideration of evidence produced after the expiration of the time limits fixed for the written proceedings.
5. The right to introduce oral testimony, including the right of cross-examination.⁶⁵

It is seldom, if ever, that provisions relating to all these points will be found in any one agreement.

As the cases submitted to claims commissions more closely approach in character those arising in municipal tribunals than do other types of international cases, it might be anticipated that more detailed rules governing the use of evidence would be included in the agreements establishing such commissions. Although this is true in some agreements, it can hardly be said to be so as a general rule. For example, a number of the agreements establishing the recent Mexican commissions contained rules of a character less detailed even than those of general arbitration agreements. The British-Mexican agreement of November 19, 1926, provided in Article 4:

"The Agent or Counsel of either Government may offer to the Commission any documents, interrogatories or other evidence desired in favour of or against any claim and shall have the right to examine witnesses under affirmation before the Commission, in accordance with Mexican Law and such rules of procedure as the Commission shall adopt."⁶⁶

The provision contained in the other agreements are even more cryptic.⁶⁷ The Protocol of April 24, 1934, between the United States

⁶⁴ 3 *Treaties, Conventions, etc.* (Redmond, 1923) 2749. Cf. *Salem Claim* (United States v. Egypt), Jan. 20, 1931, Art. 4, Ex. Agreement Series No. 33.

⁶⁵ The following are instances of agreements with more elaborate provisions: *Island of Bulama* case (Gt. Britain v. Portugal), Jan. 13, 1869, 61 Brit. and For. St. Paps. 1163; *The Halifax Commission* (United States v. Gt. Britain), May 8, 1871, Art. XXIV, 1 Malloy's *Treaties* 710; *Fur Seal Arbitration* (United States v. Gt. Britain), Feb. 29, 1892, 1 Malloy's *Treaties* 747-748; *The North Atlantic Coast Fisheries* case (United States v. Gt. Britain), Jan. 27, 1909, 1 Malloy's *Treaties* 838-840.

⁶⁶ 85 League of Nations Treaty Series 56.

⁶⁷ "IV. La Commission réglera sa procédure tout en se conformant aux dispositions de la présente Convention.

"Chaque gouvernement pourra nommer un Agent et des Conseils qui

and Mexico, however, providing a new procedure for the disposition of the cases not adjudicated under the Convention of September 8, 1923, contained somewhat more detailed rules.⁶⁸ Nor can it be said that there is any tendency in the negotiation of recent claims agreements to include more elaborate rules of evidence than in those of earlier years.⁶⁹

The framers of the Statute of the Permanent Court of International Justice followed the existing practice with respect to provisions concerning evidence in agreements establishing *ad hoc* tribunals, and stated only broad principles in the Statute leaving the elaboration of specific rules to the Court.⁷⁰ Article 30 provided

présenteront à la Commission, oralement ou par écrit, les preuves et arguments qu'ils jugeront bon d'invoquer à l'appui des réclamations ou contre elles." French-Mexican Convention, Sept. 25, 1924, *Convention conclue entre la Republique française et les états-unis du Mexique* (Mexico, 1925) 5.

The following conventions contained provisions practically identical with this: German-Mexican, March 16, 1925, Art. V, *Convención de reclamaciones*, etc. (1925) 5; Italian-Mexican, Jan. 13, 1927, Art. IV, *Convención de reclamaciones entre Mexico e Italia* (1927) 4; Spanish-Mexican, Nov. 25, 1925, Art. IV, *Convención entre los Estados unidos mexicanos y España* (1926) 5.

Cf. the provisions contained in Art. 9 of the agreement of July 8, 1905 between Brazil and Bolivia:

"Art. 9. Os advogados dos Governos sao agentes nomeados para promover a defesa dos interesses dos seus paizes, e no estudo das reclamacoes deverao apreciar as provas apresentadas e concluir conforme os principios geraes do direito e praticas internacionaes, natureza dos factos e nos termos do Tratado de Petropolis. Os advogados so poderao allegar e apresentar provas e defesa dos seus respectivos Governos." Helio Lobo's Report (1910) 160.

⁶⁸ See paragraphs d, n, o, and p of Art. 6, Ex. Agreement Series No. 57, pp. 5-6, 10.

⁶⁹ See, for example, the following provision from Art. III of the Convention of July 28, 1926, between the United States and Panama:

"The Commission shall have authority by the decision of the majority of its members to adopt such rules for its proceedings as may be deemed expedient and necessary, not in conflict with any of the provisions of this Convention.

"Each Government may nominate agents or counsel who will be authorized to present to the Commission orally or in writing, all the arguments deemed expedient in favor of or against any claim. The agents or counsel of either Government may offer to the Commission any documents, affidavits, interrogatories or other evidence desired in favor of or against any claim and shall have the right to examine witnesses under oath or affirmation before the Commission, in accordance with such rules of procedure as the Commission shall adopt.

"The decision of the majority of the members of the Commission shall be the decision of the Commission. . . ." 4 *Treaties, Conventions*, etc. (1923-1937) 4546, 4548-4549.

In his report the American agent criticized this provision on two grounds: (1) That the absence of more detailed rules of procedure made it necessary for the Commission to meet to establish such rules before any pleadings could begin, and then to adjourn pending the development of the pleadings; (2) that the rules of the Convention would permit the introduction of new evidence at any stage of the proceedings. Hunt's Report (1934) 21-23.

⁷⁰ In the course of the discussion of the matter of procedure in the Advisory Committee of Jurists which prepared the draft of a Statute for the Court the President, Baron Descamps, said that he "thought the Committee

that the Court should "frame rules for regulating its procedure." In the Convention for the establishment of the Central American Court of Justice the only provisions relating to evidence were those stated in connection with the rules controlling the pleadings.⁷¹ The section relating to arbitral procedure included in the Hague Conventions for the Pacific Settlement of International Disputes was intended to constitute a permanent code of procedure, complete in itself, available for incorporation by reference in arbitral agreements between members of the Court, or other states which might see fit to utilize it. Consequently, the rules of evidence embodied in it are more elaborate, being comparable to the rules usually adopted by tribunals after their organization.⁷² States submitting questions to arbitration under this Convention have generally agreed that matters of procedure should be controlled by its provisions.

Section 9. Rules of Procedure of the Tribunal. In the absence of detailed rules in the arbitral agreement, it is customary for tribunals to draw up and adopt more or less elaborate rules of procedure to control the proceedings before them, including therein matters relating to evidence.⁷³ This practice is followed even where the agreement confers no specific authority upon the tribunal to take such action.⁷⁴ Apparently, it has been assumed that international tribunals have a power analogous to that of municipal courts to determine their own rules of procedure, subject to any limitations upon their authority in the instrument of their crea-

should not draw up the procedure of the Court in too much detail." He added:

"The Court itself ought to formulate these rules in its internal regulations. The rules of procedure which ought to be submitted for the States' approval must deal only with fundamental points." *Procès Verbaux of the Proceedings of the Committee*, June 16-July 24, 1920, The Hague, 1920, p. 248. See also pp. 719, 732-746.

For the provisions of the Statute relating to evidence see Appendix I.

⁷¹ See the text of Articles XIV, XV, XVI in Appendix V.

⁷² For text of the relevant provisions of the Conventions, see Appendix IV.

⁷³ For the text of the rules of procedure of a number of tribunals to which the United States has been a party, especially claims commissions, see III Moore's *Arbitrations* 2133-2239.

⁷⁴ The arbitral agreement usually confers specific authority upon the commission in this respect. In some instances virtually unlimited authority is granted to the tribunal. For example, the War Claims Arbitrator, acting under a domestic statute, but in an international capacity, was authorized in Section 3 (c) of the War Claims Act of 1928 to conduct the proceedings "in accordance with such rules of procedure as he may prescribe." 45 Stat. 256, 257. The only rules of evidence prescribed were contained in the same section:

" . . . The Arbitrator, or any referee designated by him, is authorized to administer oaths, to hold hearings at such places within or without the United States as the Arbitrator deems necessary, and to contract for the reporting at such hearings. Any witness appearing for the United States before the Arbitrator or any such referee at any place within or without the United States may be paid the same fees and mileage as witnesses in courts of the United States. Such payments shall be made out of any funds in the German special deposit account hereinafter provided for, and may be made in advance."

tion.⁷⁵ The power of municipal courts does not usually extend, however, to matters of evidence. "From the very nature of things," says Ralston, "arbitral courts have the right to adopt ordinary rules to govern their procedure and determine the privileges and duties of litigants before them. This right exists whether expressed in the protocol or not, but always limited by its provisions."⁷⁶ Whatever its source there can be no doubt that the power is well established by customary practice.

Governments have undoubtedly proceeded deliberately in thus permitting international tribunals to exercise such broad powers in this respect. This may appear somewhat anomalous in view of the jealous care with which the jurisdiction of the tribunals has been limited as to substantive matters. It has been considered important, apparently, in view of the absence of a generally accepted system of arbitral procedure, not to fetter these tribunals but rather to leave them free to adapt their procedure to meet exigencies as they arise. Governments have further manifested an unwillingness to restrict the freedom of tribunals to deal with evidence according to the needs of the particular situation and the general practice of international tribunals. Thus in his report for the Third Committee to the First Hague Peace Conference, in commenting upon procedural rules of the Convention for the Pacific Settlement of International Disputes, Baron Descamps said:

"But it was not thought unimportant to insist upon the right [of the tribunal] to arrange all the formalities required for dealing with the evidence. Upon this vital point it is important to invest the arbitrators with the most extended powers."⁷⁷

⁷⁵ The Institute of International Law included in its "Draft Regulations for International Arbitral Procedure" adopted in 1875, the following provision:

"Article 15. In the absence of provisions in the *compromis* to the contrary, the arbitral tribunal has the power:

"1. To determine the forms and periods in which each party must, through its duly authorized representatives, present its conclusions, establish them in fact and in law, submit its instruments of proof to the tribunal, communicate them to the adverse party, produce the documents whose production the adverse party requires;

"4. To issue orders of procedure (on the conduct of the case), to cause proofs to be furnished, and, if necessary, to call upon the competent tribunal for judicial acts for which the arbitral tribunal is not qualified, particularly sworn testimony of experts and witnesses," Scott, *Resolutions of the Institute of International Law*, New York, 1916, pp. 4-5.

⁷⁶ Ralston, *Law and Procedure* (1926) 197.

⁷⁷ *Hague Conference Reports*, p. 84. The comment referred to Art. 49 which provided: "The tribunal is entitled to issue rules of procedure for the conduct of the cases, to decide the forms and time in which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence." *Ibid.* 83. For comparable provision in Convention of 1907, see Art. 74, *ibid.* 348.

While the practice of thus intrusting tribunals with discretion in formulating their own rules of procedure, including rules of evidence, seems wise, on the whole, it has the disadvantage of opening the door to carelessness and looseness in dealing with these important matters. Some tribunals have virtually left the parties to their own devices, although there is a noticeable tendency in more recent tribunals to impose more stringent and specific rules. An important benefit, however, balancing this is the fact that this procedure has left tribunals free to follow the practice of other tribunals, with the result that a considerable degree of uniformity of practice has developed.

Acting under the authority granted to it in Article 30 of its statute "to frame rules for regulating its procedure," the Permanent Court of International Justice originally issued a set of rules on March 24, 1922. Revised texts of these rules have since been issued on July 31, 1926, February 21, 1931, and March 11, 1936.⁷⁸ In framing these rules the Court has considered itself bound not to go beyond the principles concerning evidence set forth in the Statute. It has further manifested an unwillingness in revising its rules to adopt any new rules of evidence beyond those indicated by its experience to be necessary. The rules of evidence contained in the Ordinance of Procedure adopted by the Central American Court of Justice on November 6, 1912, in pursuance of Article XXVI of the Convention establishing the Court are more technical in character than those of the Permanent Court.⁷⁹ This was probably partly due to the fact that individuals were granted the right to institute proceedings before the Court.

Section 10. Rules From Customary Law. Strictly speaking, as will be seen from the discussion in sections 8 and 9, international tribunals have no authority in dealing with evidence to go beyond the provisions of the agreements creating them and the rules adopted in pursuance thereof. There are usually few, if any, restrictive provisions in the agreements to prevent tribunals from putting in the rules such provisions drawn from the general practice of other tribunals, and such principles drawn from municipal law as they deem advisable. In practice, tribunals will be found turning to rules customarily applied and to general principles of law, subject always to the limitations imposed by the arbitral

⁷⁸ An account of the various revisions of the Court's rules is given in the letter in which the Registrar requested the Secretary General of the League of Nations to transmit the text of the rules adopted March 11, 1936, to the Members of the League. Series D, No. 2 (3d add.), Introduction, p. 5. For the text of the original rules and the various revisions, see Appendices II, III.

⁷⁹ For texts of the Convention and of the Ordinance of Procedure, see Appendices V and VI.

agreements. This is especially true when it comes to the matter of weighing and evaluating the evidence, as previously indicated in section 4.⁸⁰

A further fact of significance in this respect is the effect of the freedom accorded to tribunals in the formulation of their rules of procedure. The consequent tendency of each tribunal to adopt on essential points rules similar to those used by preceding tribunals has resulted in the development of what virtually amount to customary rules of law. It might be going too far to say that a tribunal is bound, in the absence of provisions in the arbitral agreement, to follow these rules. Nevertheless, parties would undoubtedly have a basis for solid objections if a tribunal should refuse, for example, to compel the production of the originals or certified copies of documents relied on but not produced, to permit the inspection by one party of documents produced by the other, in the event that the documents have not been communicated, to refuse one party an opportunity to comment upon or rebut evidence offered by the other. The body of practice accumulated in the proceedings before the Permanent Court of International Justice will no doubt serve as an influential standard in the drafting of provisions in arbitral agreements and in the formulation of rules by *ad hoc* tribunals. Of course, as heretofore pointed out, in theory no ruling on a point of practice by one tribunal is binding as a precedent on another. This does not mean, however, that a cumulation of precedents may not be invoked by a tribunal as indicating the existence of a settled principle of law entitled to great weight, so long as its application would not result in a departure from the terms of the arbitral agreement.

⁸⁰ See *supra*, pp. 13-14.

CHAPTER II

ORDER AND TIME OF THE SUBMISSION OF EVIDENCE

ORDER OF SUBMISSION

Section 11. In international proceedings, written or documentary evidence is almost without exception presented to the tribunal before the oral proceedings, if such are to be had. The proceedings are opened with the written pleadings which are accompanied by the evidence in support of them. With reference to the submission of testimonial evidence before *ad hoc* tribunals, it is the general practice to submit such evidence before counsel address the court. The oral arguments, as a rule, close the proceedings. The tribunal has the right in most cases, however, to request the submission of further evidence or comment on evidence already submitted.¹

The question of the order in which witnesses and counsel should be heard was the subject of some discussion during the formulation of the rules of the Permanent Court of International Justice in 1922. Lord Finlay pointed out the difference between Continental and Anglo-American procedure in this respect, that is, that in the former, counsel were always heard after the taking of all the evidence, whereas in the latter, counsel might open their cases before the examination of the witnesses. He advocated that it be left to the Court to make an order on the subject in each special case. In answer to a question from M. Anzilotti, Lord Finlay said that before deciding the order in which evidence was to be taken and cases presented by counsel, the Court would not fail to hear the views of the Parties, and that the Court could always allow counsel to be heard after the evidence had been taken. The question having been raised whether the Statute left the Court a free hand in this matter, it was finally agreed that, "although based

¹ In the *Halifax Commission*, however, under the rules as originally adopted (Art. III), Great Britain was treated as having the position of plaintiff, and the United States was expected to open its case before presenting its testimony by laying before the Commission the general scheme of its argument and indicating the points on which evidence would be submitted in support. Upon motion by the United States, the Commission permitted it to introduce its evidence first and to make its oral argument afterward, reserving to Great Britain, however, the right of general and final reply. *Documents and Proceedings*, vol. 1, pp. 13, 35-36, 40; I Moore's *Arbitrations* 731-732.

chiefly on continental procedure," the Statute did give the Court power to regulate this matter.² The rule agreed upon was embodied in Article 45 [1936 Rules, Article 50]:

"The Court shall determine whether the parties shall address the Court before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given."

The rule was the subject of severe criticism during the revision of the rules in 1926, that of M. de Bustamante being the most extensive. He said, in part:

"... the object of statements by counsel was not confined to the reproduction of the written documents. Their aim was to make known, as far as possible, to the Court the arguments and opinions of counsel on various questions and on the evidence by which the written proceedings had been supplemented. If that were the correct understanding of the oral proceedings, it was inconceivable that there should first be written proceedings, then oral proceedings followed by the submission of evidence and finally a recommencement of oral proceedings . . ."

M. Anzilotti pointed out that in the *Upper Silesia* case the expert witnesses called by Germany had been heard with the greatest advantage after the speeches by counsel, while Judge Moore recalled that in the proceedings in *Advisory Opinion No. 13*, the Court had been unable to decide before the oral statements whether the parties should or should not submit witnesses. M. de Bustamante's proposal that the words "before or" be struck out of the rule was rejected.³ The rule has since been retained in its original

² Series D, No. 2, pp. 81, 142; Series D, No. 2 (add.), p. 116. During the revision of the rules in 1926, a proposal by M. Pessoa to delete Article 45 was rejected, as was also a proposal by M. de Bustamante that it be re-drafted to read as follows: "The representatives of the Parties shall address the Court after the production of the evidence."

³ Series D, No. 2 (add.), pp. 114-118.

"M. Weiss pointed out that the new wording proposed by M. de Bustamante did not leave much of the original text, which provided for an alternative: the Court could determine whether the representatives should address the Court before or after the production of the evidence. M. de Bustamante wished to delete the words 'before or.' The Court, therefore, could only decide that the representatives of the Parties should speak after the production of the evidence. It was not necessary to have an article in the Rules for that.

"M. Pessoa said that that was just the reason why he proposed the deletion of the whole article.

"M. Anzilotti pointed out that hitherto the President, at the conclusion of the oral proceedings, had often stated that the proceedings were not closed, because the Court reserved the right to ask for further information and evidence. M. de Bustamante's proposal would destroy that possibility, and M. Anzilotti thought that that was inadmissible.

"M. de Bustamante thought that Article 45 of the Rules had nothing to do with the Court's right to ask for information.

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form, although in 1936 consideration was given to a proposal by the Coordination Commission, appointed by the Court, that the wording be changed to make it clear that the rule applied only to oral evidence.⁴

"The President thought, in regard to the Court's right to ask for information, that it could always invoke Article 49 of the Statute which said: 'The Court may even before the hearing begins, call upon the agents to produce any documents or to supply any explanations.'

"M. Nyholm desired to allude to the main principles which governed the matter. It would not be well to introduce changes without taking them into account. At the time of the preparation of the Rules a somewhat lengthy discussion which centred around two main principles adopted in various legislations had taken place.

"In French legislation, no evidence was admitted except by virtue of a decision of the Court. That was a special system which differed from most other legislative systems of the world, which left it to the Parties to produce any evidence which they wished.

"What was the situation created by the Rules and by the Statute? It was the outcome of Articles 44 to 54 of the Statute, from which the deduction was that a free hand was left to the Parties; and though certain articles stipulated that the Court could, at any time, entrust an enquiry to an expert, or call for the production of fresh evidence, that was only incidental.

"Another principle established by the Rules was that after the production of evidence, the Parties were allowed to comment upon it. That was in conformity with Article 54 of the Statute, which said: 'When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed.'

"From these principles, in M. Nyholm's opinion it followed that the right of the Parties to speak before and after the production of evidence must be respected. Nevertheless, they might very well accept M. de Bustamante's proposal for the suppression of the words 'before or,' because counsel could address the Court before the production of evidence, whether those words were or were not included in the Rules.

"M. Anzilotti thought that, if Article 45 merely emphasized the freedom of action enjoyed by the Court, there was no reason against maintaining it. According to the terms of the article, the Court was at liberty, if it so desired, to call upon counsel to address the Court before the production of evidence. This might be advantageous, because the evidence might perhaps not be necessary." *Ibid.* 117-118.

⁴ Series D, No. 2 (3d add.), p. 872. "The President gathered that Article 45 had been adopted in 1922 as a sort of combination of the procedure in Anglo-Saxon countries and that followed on the continent, . . ." and "that the Court was agreed that the words: 'des divers moyens de preuve' (evidence) in the last line but one of Article 45, did not include documents annexed to the documents of the written proceedings." *Ibid.* 251-253.

In his Report of June, 1933, on the revision of the rules the Registrar had the following to say concerning Article 45:

"So far no case calling for the application of this Article has actually occurred. Evidence produced before the Court is, in fact, almost always documentary evidence. In rare cases where the Court has admitted evidence by witnesses or by experts, it has provided for a special procedure including a public discussion before the Court by the representatives of the parties, on the expert enquiry, such debate being separate and distinct from the oral argument properly so called.

"2. On the other hand, as regards documentary evidence and the right of the parties to discuss such evidence, the Court's doctrine for the interpretation of Article 52 of the Statute has been recently formulated as follows:

"(a) new evidence cannot be produced by one party at a moment when the other party is no longer in a position to give its opinion on such evidence;

"(b) failing a special decision, the time-limit contemplated by Article 52 of the Statute coincides with the termination of the written proceedings;

The rule appears to be based on sound principle, and represents a practice which might well be adopted by *ad hoc* tribunals when occasion arises.

TIME OF SUBMISSION

Section 12. During the Written Proceedings: With the Written Pleadings. It is generally required in the arbitral agreement, and if not there in the rules of procedure, that the various instruments of the written pleadings shall be accompanied by all the documents in support of the allegations and contentions contained in them.⁵ Thus Article 43 of the Statute of the Permanent Court of International Justice provides:

"The written proceedings shall consist of the communication to the judges and to the parties of Cases, Counter-Cases, and if necessary, Replies; also all papers and documents in support."⁶

The provision in Article 63 of the Hague Convention of 1907, is, in effect, identical with this.⁷ It has been customary in agreements submitted to arbitration under this Convention to provide that with each written pleading shall be submitted copies of all the

but if new documents are produced by one party in the course of the oral arguments, the consent of the other party is assumed, provided that such party does not formally oppose the production of the documents in question.

"In the Eastern Greenland case, the Court adopted a decision definitely based on this principle.

"3. In applying this doctrine, the Court has sometimes felt constrained, as an exceptional measure, to admit a third oral statement by one of the parties, e.g. when new documents have been relied on in the course of the oral rejoinder." *Ibid.* 823.

⁵ As illustrative of cases in which such a provision is contained in the rules see the rules of procedure of the following claims commissions: German-Mexican, Rules, March 6, 1926, Arts. 14 (c), 15 (c), 16, *Convención de reclamaciones* (1925) 12; British-Mexican, Rules, Sept. 1, 1928, Arts. 12, 13, 14, *Decisions and Opinions*, p. 11; Italian-Mexican, Rules, Dec. 6, 1930, Arts. 12, 13, *Reglas de procedimiento* (1931) 9-10; Spanish-Mexican, Rules, 1927, Arts. 14, 15, 16, *Reglas de procedimiento* (1927) 6-7. For similar provisions, see "Lottie May" case (Gt. Britain v. Honduras), March 20, 1899, Art. 4, Incidente "Lottie May," *Arbitramento entre la Republica de Honduras y la Gran Bretaña* (Tegucigalpa, 1897) 3-4; *Costa Rica-Nicaragua Boundary Arbitration*, Dec. 24, 1886, Art. V, W. R. Manning, *Arbitration Treaties Among the American Nations* (New York, 1924) 166, 168; *British Guiana-Venezuela Boundary Arbitration*, Feb. 2, 1897, Arts. VI, VIII, 89 Brit. For. St. Paps. 57, 65 (1896-1897).

For an exposition of the nature and content of the written pleadings from the standpoint of procedure see C. M. Bishop, *International Arbitral Procedure* (Baltimore, 1930) 64-70, 116-118, 177-186; Ralston, *Law and Procedure* (1926) 197-205; Manley O. Hudson, *Permanent Court*, pp. 479-492; Feller, *Mexican Commissions*, pp. 231-236; W. C. Dennis, "Necessity for an International Code of Arbitral Procedure," 7 A.J.I.L. 289 (1913).

⁶ For the relevant provisions in the Rules of the Court, see Articles 42 and 43, Appendix II.

⁷ For text, see Appendix IV.

evidence relied upon in support of it, or in the absence of such a provision, that the proceedings shall be conducted in accord with the procedural provisions of the Convention.⁸

It is sometimes provided in the arbitral agreement that the evidence submitted with the counter case or answer, and with subsequent documents of the pleadings, shall be limited to evidence in answer to or rebuttal of the case, or to the pleading to which it relates, as the case may be.⁹ This does not seem to be the usual practice. It is doubtful whether in the absence of such provision exception may successfully be taken to the submission of new evidence with such pleadings not directed to answering or rebutting previous pleadings. It has at times been contended, however, that a party is bound to submit with its case or memorial all the evidence on which it intends to rely in support of its allegations and contentions, and that evidence subsequently submitted must be limited to defense and rebuttal.¹⁰ The basis for this view and its validity will be more fully considered in sections 14, 15, and 20.

A provision unusually strict in this respect is that contained in paragraph (d) of clause Sixth of the Protocol of April 24, 1934, between the United States and Mexico:

"With the Memorial the claimant Government shall file all the evidence on which it intends to rely. With the Answer the respondent Government shall file all the evidence upon which it intends to rely. No further evidence shall be filed by either side except such evidence, with the Brief, as rebuts evidence filed with the Answer. Such evidence shall be strictly limited to evidence in rebuttal and there shall be explained at the beginning of the Brief the alleged justifica-

⁸ A few typical cases may be cited: *Japanese House Tax* case (Gt. Britain, France, Germany v. Japan), Aug. 28, 1902, Arts. 3-5, *Recueil des Actes et Protocoles* (The Hague, 1905) 14; *Muscat Dhows* case (France v. Gt. Britain), Oct. 13, 1904, Art. 2, *Recueil des Actes et Protocoles* (The Hague, 1905) 6; *Russian Indemnity* case (Russia v. Turkey), July 22/Aug. 4, 1910, Art. 6, *Protocoles des Séances et Sentence du Tribunal d'arbitrage* (The Hague, 1912) 8; *Manouba* case (France v. Italy), March 6, 1912, Art. 3, *Compromis, Protocoles des Séances* (The Hague, 1913) 6; *French Claims* case (France v. Peru), Feb. 2, 1914, Art. 3, *Compromis, Protocoles des Séances*, etc. (The Hague, 1921) 6.

⁹ *Japanese House Tax* case (Gt. Britain, France, Germany v. Japan), Aug. 28, 1902, Art. 3, *Recueil des Actes et Protocoles* (The Hague, 1905) 14; *North Atlantic Coast Fisheries* case (United States v. Gt. Britain), Jan. 27, 1909, Art. 6, 1 Malloy's *Treaties* 838; *Canevaro* case (Italy v. Peru), April 25, 1910, *Protocoles de Séances et Sentence* (The Hague, 1912) 6.

"The proofs in support of the claims shall be filed with the memorials, and no proofs will be received subsequently, except such as are strictly to rebut proofs which shall have been presented on the part of New Granada." United States-New Granadian Claims Commission, Sept. 10, 1857, Rules of Procedure, III Moore's *Arbitrations* 2139. The Rules of Procedure of the United States-Costa Rican Mixed Claims Commission, July 2, 1860, contained an identical provision, *ibid.* 2142, and those of the United States-Mexican Commission, July 4, 1868, a similar provision, *ibid.* 2145.

¹⁰ See especially the *Palmas Island* case (United States v. The Netherlands), Jan. 23, 1925, Nielsen's Report (1928) 11-14.

tion for the filing thereof. If the other side desires to object to such filing, its views may be set forth in the beginning of the Reply Brief, and the Commissioners, or the Umpire as the case may require, shall decide the point, and if it is decided that the evidence is not in rebuttal to evidence filed with the Answer, the additional evidence shall be entirely disregarded in considering the merits of the claim."¹¹

The strictness of the rule is perhaps partly explained by the intent, stated in paragraph (e) of Clause Sixth to "reduce the number of pleadings and briefs to a minimum in the interest of economy of time and expense." The rule is ameliorated somewhat by the further provision in paragraph (d) that "the Commissioners may at any time order the production of further evidence," although it might be queried whether the Commission could order the production of evidence it had held inadmissible under the provision quoted.

When the evidence to be submitted with the countercase, answer, and subsequent pleadings, is thus restricted, a safeguarding provision is sometimes included, such as the following from Article 6 of the Special Agreement of January 27, 1909, in the *North Atlantic Fisheries* case:

"The foregoing provisions shall not prevent the tribunal from permitting either party to rely at the hearing upon documentary or other evidence which is shown to have become open to its investigation or examination or available for use too late to be submitted within the period hereinabove fixed for the delivery of copies of evidence. . . . The admission of any such additional evidence, however, shall be subject to such conditions as the Tribunal may impose, and the other Party shall have a reasonable opportunity to offer additional evidence in rebuttal."¹²

Evidence not thus presented within the time limits prescribed for the filing of the pleadings, with the exception of oral evidence to be produced by examination of the witnesses, may not later be invoked unless the opposing party, or parties, consents, or the tribunal itself requests or permits the production of evidence not before it.¹³ In rare instances the arbitral agreement may specify

¹¹ 4 *Treaties, Conventions, etc.* (1923-1937) 4489, 4492.

¹² 1 *Malloy's Treaties* 839.

¹³ *Chevreau* case (France v. Gt. Britain), March 4, 1930, Art. IV, *Compromis, Protocoles des Séances* (The Hague, 1931) 3; *San Domingo Improvement Co.* case (United States v. Dominican Republic), Jan. 31, 1903, Art. III, 1 *Malloy's Treaties* 415; *Harrah* case (United States v. Cuba), Oct. 1, 1929, Art. IV, Rules, Arts. 1, 2, 6, *Record of the Proceedings*, ms. Dept. of State, pp. 2, 12 (settled by agreement); *Shufeldt* case (United States v. Guatemala), Nov. 2, 1929, Arts. 4, 5, 7, *Shufeldt Claim* (1932) 10; Tribunal arbitral brasileiro-boliviana, March 21, 1903, Rules, June 3, 1905, Art. 1, I *Introdução e atas* (1911) 7; Tribunal arbitral franco-chilien, Rules, Oct. 17, 1895, Arts. I, X, pp. 3, 5; *Convención de arbitraje entre Francia y Chile* (Oct. 19, 1894)

with particularity the evidence to be submitted, and provide that no other shall be considered.¹⁴

In the *Norton* case before the United States-Mexican Commission of 1868, Umpire Thornton refused to admit certain evidence submitted by Mexico nearly two years after the filing of the Memorial by the United States, when under the rules it should have been submitted within four months, saying that to admit it would be "both unjust and inexpedient." He said further in explanation of his action:

"The presentation of these proofs was a violation of the rules not only without good cause, but without any cause, shown. It was a violation by the Government of Mexico of the rules, to the framing of which the Commissioner who represented it, contributed. If this violation of the rules be allowed to their framers, how would it be possible in common justice to forbid a similar violation to the claimants who had nothing to do with making the rules?"

"If this evidence be admitted in the present case, the claimant must be allowed, to procure rebutting testimony and there is no just reason why he should not be allowed the same term as was employed by the defendant to procure his proofs. The adoption of such a principle would render the settlement of the claims within prescribed term impracticable."¹⁵

Art. 4, p. 4; Commission des réclamations, 1919 (Haiti), Rules, Art. 12, *Arbitral Procedure of the Claims Commission Established under the Protocol of Oct. 3, 1919, between the United States and Haiti*, Mimeographed copy, Dept. of State, Arts. 12, 13, p. 14; German-Belgian Mixed Arbitral Tribunal, Rules, Art. 49, 1 *Recueil des décisions* 39, and for analogous provisions in the rules of the other Tribunals, see *Recueil des décisions*, vol. 1, *passim*. See comment of the Agent of Chile on the failure of Great Britain to submit with the Memorial all the evidence in support thereof in the proceedings before the Anglo-Chilean Mixed Claims Commission of 1894-1896. *Informe del Ajente de Chile* (Santiago, 1896) 26-28. See also Witenberg and Desiroux, *L'organisation judiciaire. La procédure et la sentence internationales* (Paris, 1937) 232-233.

¹⁴ After providing for an exchange of statements and the mutual communication of all evidence intended to be relied upon, the Convention of Sept. 29, 1827, between the United States and Great Britain, submitting to arbitration the determination of the northeastern boundary of the United States, declared in Art. III: "No maps, surveys, or topographical evidence of any description, shall be adduced by either party, beyond that which is hereinafter stipulated, nor shall any fresh evidence of any description be adduced or adverted to, by either party, other than that mutually communicated or applied for as aforesaid." 1 Malloy's *Treaties* 648. This was made subject to the right of the Arbitrator to call for further evidence. See also Art. VI, *ibid.* 649. Cf. *infra*, pp. 126-127.

¹⁵ III ms. *Opinions* 241. See also opinions of Commissioners Wadsworth and Zamacoma, *ibid.* 155, 156, 157-159.

See also statement by Mr. Nielsen, Agent for the United States, before the American-British Claims Commission of 1910 in the cases of the *Eastern Extension Australasia and China Telegraph Co., Ltd.*, and the *Cuba and Submarine Telegraph Co., Ltd.*, "Argument by Fred K. Nielsen, Agent for the United States," pp. 4-5, *Pleadings and Awards* (1910), Vol. 13, No. 36.

Under the Statute and Rules of the Permanent Court of International Justice, evidence submitted after the time limits prescribed for such submission, may be received only if the opposing party consents or, in the event that such consent is refused, if the Court sanctions its production.¹⁶ The Hague Convention of 1907 provides in Art. 67:

"After the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party."

Section 13. The Same: Rebuttal Evidence. Although it is not always specifically so provided in the arbitral agreement or in the rules, it seems clear that a party always has the right to submit evidence in rebuttal of any evidence submitted by another party after the close of the formal written pleadings or during the course of the oral proceedings. It is customary to assure the right of each party to submit evidence in answer to any evidence submitted by another in support of the formal instruments of the written pleadings.¹⁷ Article 45 of the Rules of the Permanent Court of International Justice reserves to parties the right to comment on evidence produced during the oral hearings. Under the liberal practice of the Court in admitting further evidence during the argument, this has proved to be a right of importance, and parties have insisted not only on the right to comment, but also to submit evidence in rebuttal of such evidence.¹⁸

When the arbitral agreement specifically permits a party to submit and rely upon evidence not submitted with the pleadings, this is generally made subject to the right of the other party, or parties to offer additional evidence in rebuttal.¹⁹

¹⁶ For an account of the practice of the Court on this point, see *infra*, sec. 17.

¹⁷ In some instances, the rules of Claims Commissions go so far as to give parties the right to submit further evidence in answer to the last instrument of the written pleadings. See, for example, American-British Claims Arbitration, Aug. 18, 1910, Rules of Procedure, April 26, 1912, Art. 19, Nielsen's Report (1926) 13.

¹⁸ See *infra*, sec. 17.

¹⁹ *North Atlantic Coast Fisheries* case (United States v. Gt. Britain) Jan. 27, 1909, Art. VI, 1 Malloy's *Treaties* 839; *Japanese House Tax* case (France, Germany and Gt. Britain v. Japan), Aug. 28, 1902, Art. 6, *Recueil des Actes et Protocoles* (The Hague, 1905) 15.

"X. After the proofs on the part of Spain shall have been closed and filed, the Commission shall in every case, when the claimant shall desire to take rebutting proof, accord a reasonable time, in its discretion for the taking of such rebutting proof." United States-Spanish Claims Commission of 1871. Regulations in Force Feb. 12, 1871, III Moore's *Arbitrations* 2170.

"At the Twelfth Session, in the case of the Mavrommatis Jerusalem Concessions, one of the Parties desired to have somewhat extensive amendments made in the text of his Case some time after that document had been filed and transmitted to the other Party. Permission was only granted after the consent of the other Party—which reserved the right to comment on the matter—had been obtained." Permanent Court of International Justice Publications, Series E, No. 6, p. 290.

Section 14. The Same: Later Submission of Evidence. A customary rule in proceedings before international tribunals is that evidence shall not be considered if submitted at such a time as to deprive the opposing party of an opportunity to comment upon it or to offer rebutting evidence.²⁰ This is a rule well established in the jurisprudence of the Permanent Court of International Justice.²¹ To induce an early submission of evidence, and thus to assure ample time for answering it, it is customary, as pointed out in the preceding section, to provide in the arbitral agreement, and if not there in the rules of procedure, that each instrument of the written pleadings be accompanied by the evidence relied upon in support of it. In a few instances, as a sanction to insure the observance of this rule, it has been provided in the rules of procedure that no proofs submitted subsequent to the first pleading by each party will be considered.²²

The question has occasionally been presented whether evidence submitted at a late stage in the proceedings, subsequent to the instrument of the pleadings to which it relates, may for that reason properly be refused admission. The propriety of such late submission of evidence must of necessity be tested with reference to the terms of the arbitral agreement. Any challenge to the right of a party to submit evidence to the tribunal must be based upon the solid ground of a limitation imposed by the arbitral agreement or by the rules of procedure adopted by the tribunal in pursuance of authority conferred upon it by the agreement. The problem is in effect one of treaty interpretation, and the answer must

²⁰ In the *Guerra* case before the United States-Mexican Mixed Claims Commission of 1868, the claimant submitted certain evidence a few days before the expiration of the Commission, several years after the time for filing it had elapsed, and after the Commissioners had filed disagreeing opinions. The Umpire held that it could not be taken into consideration as "to do so would be unfair towards the defendant who has had no opportunity of refuting the testimony produced at so late an hour." VI ms. *Opinions* 310, 356. The Umpire rejected new evidence concerning the valuation of certain property in the *Pradel* case saying he had "no right to take into consideration" such evidence, "seeing that the claimant has not had an opportunity of rebutting its contents." *Ibid.* 460, 461.

²¹ "At the 21st extraordinary Session, on April 20th, 1931, (ninth meeting) the Court considered a request, made by one of the Agents in the case before it, for time to prepare a reply and to produce new evidence for which he had been asked by the Court. It was agreed that, in accordance with precedent, when the representative of a Party or interested government filed fresh documents or based an argument on fresh evidence after the last oral statement of the other side, the latter should be at liberty to comment on such documents or evidence, but his observations must not develop into a fresh pleading." Series E, No. 7, p. 297. For further precedents on this point see sec. 17.

²² United States-New Granadian Mixed Claims Commission, Sept. 10, 1857, Rules, June 11, 1861, Art. 1, ms. *Journal of Proceedings*, National Archives of United States, p. 8; United States-Colombian Joint Claims Commission, Feb. 10, 1864, Rules, Aug. 24, 1865, Art. 1, Printed Circular, National Archives of United States; American-Venezuelan Mixed Claims Commission, Feb. 17, 1903, Rules, Art. IV, Ralston's Report (1904) 6.

be sought in the intent of the contracting parties to surround with restrictions their freedom in the submission of evidence during the course of the proceedings.

The question of the propriety of such a late proffer of evidence has arisen in certain proceedings to which the United States has been a party.²³

During the proceedings in the *Fur Seal Arbitration*, the United States moved for the dismissal of a supplementary report by the British Commissioners on seal life in the Behring Sea on the ground that, having been attached to the counter case, it had been submitted after the time provided by the treaty.²⁴ Great Britain had only attached the report to the counter case upon the insistence of the United States that it be submitted to give the United States an opportunity to answer it. The contention of Great Britain was that it would only be necessary to consider the report, in the event that

²³ See especially the discussion of the *Palmas Island* case in the next section. Mr. Hunt, Agent of the United States, makes the following comment concerning this matter of the time of the presentation of evidence in his Report of the American-Panamanian General Claims Arbitration of 1926:

"One of the greatest difficulties in the matter of expeditious and satisfactory pleading and presentation of international causes has to do with the introduction of evidence. In most civil-law countries, unlike in the United States and England, the introduction of new evidence is permitted at various stages of judicial proceedings, even during the pendency of an appeal before the tribunal of last resort. Owing to the general absence from arbitral conventions of any provisions regulating this phase of procedure, it is becoming a somewhat general practice of arbitral tribunals similarly to admit evidence at any stage of the proceedings, even during oral arguments . . . it is not inconceivable that, on occasion, vital evidence may be withheld until the time for the collection of counter evidence shall have passed. Decisions rendered on the basis of such evidence cannot, of course, be sure determinations of the justice of the controversies in question. It is much more important that all evidence be introduced with the earliest pleadings in arbitral cases because, unlike in domestic proceedings, the matter of obtaining counter evidence is often a very difficult and dilatory one, and consequently the development of new issues of fact and law at late stages of the arbitral pleadings unduly prolongs the proceedings. . . .

"The commission is entitled to have the issues of fact clearly developed in the first instance and to have the legal issues clearly formulated and developed on the basis of such factual foundation. This systematic method of developing a case is impossible if new issues of fact are to be introduced at various stages of the proceedings even up to and through oral arguments, as has sometimes happened." Hunt's Report (1932) 22-23.

²⁴ *Proceedings, Fur Seal Arbitration* (1895), vol. XI, p. 25. The relevant articles of the treaty of Feb. 29, 1892, provided:

"Art. III. The printed case of each of the two parties, accompanied by the documents, the official correspondence, and other evidence on which each relies, shall be delivered in duplicate to each of the Arbitrators and to the Agent of the other party as soon as may be after the appointment of the members of the tribunal, but within a period not exceeding four months from the date of the exchange of the ratifications of this treaty.

"Art. IV. Within three months after the delivery on both sides of the printed case, either party may, in like manner deliver in duplicate to each of the said Arbitrators, and to the Agent of the other party, a counter case, and additional documents, correspondence, and evidence, in reply to the case, documents, correspondence, and evidence so presented by the other party."

1 Malloy's *Treaties* 747-748.

the tribunal found it necessary to proceed to the formulation of regulations for the taking of seal. The United States vigorously opposed this view in its written Argument, maintaining that all the provisions of the treaty pointed to the conclusion that there was "to be but one hearing, one submission of evidence, one argument, one determination." The Argument of the United States continued:

"Assuming that the interpretation of the treaty insisted upon by the counsel of the United States is the correct one the procedure adopted on the part of the British Government is wholly irregular and unauthorized, and the matter thus irregularly sought to be introduced before the Tribunal should be excluded from its view. Otherwise the Government of the United States would be placed under a disadvantage to which it should certainly not be subjected.

"In the first place all the testimony and proofs which bear alone upon the question of regulations would come before the Tribunal without any opportunity on the part of the United States for making an answer to it. No such possibility is contemplated by the treaty nor should it be allowed."

The United States contended that a further disadvantage to her resulting from this procedure was that it would enable Great Britain to present or withhold evidence according to what she learned from the case of the United States.²⁵

In the course of his reply on behalf of Great Britain, Sir Charles Russell declared:

"Thus I come back to my idea of a few moments ago, that we seek to put this in evidence which under Article VII may be received by this Tribunal under the title of 'such other evidence as either Government may submit', and let me say that I do not recede from, but stand by, what I said, that up to the moment that you retire to consider the question of Regulations after you shall first have decided, as the Treaty requires, the five questions of right, raised for your distinct decision, it is within the competence of this Tribunal to receive any evidence offered by either Government which throws any valuable light upon and in relation to the question."²⁶

The Tribunal ruled on April 12, 1893, that the report "be not now received, with liberty, however, reserved to counsel to adopt such

²⁵ *Ibid.*, vol. XI, pp. 59-60.

²⁶ *Ibid.*, vol. XI, pp. 59-60. Article VII, to which Sir Charles Russell referred, related to the contingency of a further proceeding should the decision of the tribunal be such as to require the concurrence of Great Britain in the establishment of Regulations. It provided that in the event of such further proceedings there should be submitted to the Arbitrators "the report of a Joint Commission to be appointed by the respective Governments . . . with such other evidence as either Government may submit." 1 Malloy's *Treaties* 749.

documents . . . as part of their oral argument if they deem proper." The question of the admissibility of the appendices attached to the document was reserved for further consideration "without prejudice to the right of counsel on either side to discuss that question or the contents of the appendices, in the course of the oral arguments."²⁷

In the *Pelletier* case, counsel for the United States took a somewhat different position, partly due to a provision contained in the Protocol. The Protocol provided in Article III that the Arbitrator should receive all papers and evidence relating to the claim which might be presented to him on behalf of either Government, but that if "in the presence of such papers and evidence, the Arbitrator should request further evidence," the Governments should procure and furnish such evidence. After a preliminary presentation of evidence, the Solicitor General, speaking for the United States, referring to this provision, said that his Government supposed "in view of that language that the initiative would rest upon the arbitrator." Counsel for Haiti said that they would not object to that course if "thought to be a wise one," but added.

" . . . I do not see, under the circumstances of this case, as far as they have been developed, nor do I discover from the observations made by the Solicitor-General, any reason why this claimant should depart from the ordinary course, not only in courts of justice in civilized countries, but also from the course that is pursued, as far as I know, in all international commissions. The party moving should state and prove the facts on which he relies to support his claim. I cannot imagine that the Counsel who are sitting around this table, representing this claimant, are in any doubt as to what they are required to prove. This case has been in existence twenty years. It is familiar to the claimant and his counsel, and Captain Pelletier is not an incapable man, whatever else he may be. He has knowledge of all the facts, and he has learned counsel who can advise him."

Justice Strong, the Arbitrator, stated that he would call for such further evidence as he saw fit, but that he apprehended great delay in that form of proceeding. Later when the United States offered additional evidence, stating that it considered that it had established a *prima facie* case, and that this should be considered as rebuttal evidence, the Arbitrator declared that he did not so understand it, and that the United States "should present, in the first place, all of the case which it proposed to submit to the arbitrator."²⁸

²⁷ *Proceedings, Fur Seal Arbitration* (1895), vol. I, pp. 21-22. See *Whaling and Sealing Claims* case (United States v. Russia) Aug. 26, 1900, 1902 For. Rel., Appendix I, pp. 405, 409, and *infra*, p. 250.

²⁸ *Record of Pelletier Claim* (1885), vol. I, pp. 485-487, 490-493, 497-498. Under the terms of Article I of the Boundary Treaty of April 11, 1908,

Section 15. The Same: Later Submission of Evidence. The Palmas Island Case. The question was debated at some length in the *Palmas Island* case whether evidence in support of the affirmative case of a party, which might have been presented with the first written pleading, may properly be withheld and submitted at a later stage in the pleadings, especially when the pleading with which it is submitted is optional. At the beginning of its Memorandum [the designation given the first written pleading by the Arbitral agreement] the Netherlands Government put the following: "Note: In the following memorandum various documents are being referred to. Authentic copies are available; they will be produced if desired by the Arbitrator. The more important of the documents are annexed to the memorandum."

In its Counter-Memorandum, the United States took strong exception to this procedure. This note, the United States declared, indicated a procedure properly "characterized as remarkable and without precedent in international arbitrations."

between the United States and Canada, the question of the boundary in Passamaquoddy Bay was to be submitted to arbitration in the event of a failure of the parties to reach an agreement within six months after the exchange of printed statements provided for in the Article. Agreement not having been reached, the United States and Great Britain proceeded as a preliminary to the arbitration to exchange the statement of facts called for in Article I. In response to a note of July 15, 1909, from Great Britain announcing her readiness to exchange the reply arguments, the Department of State said in a note of Sept. 23, 1909, to the British Ambassador:

"The necessity for resorting to arbitration in this case brings up again the subject mentioned in the Department's note to you of March 24 last, namely, the omission on the part of Great Britain to furnish to this Government copies of a number of the maps, documents and records referred to in the British brief of December 3 last, and in the possession of Great Britain but not accessible to the United States. I then expressed the view that the provisions of Article I of the treaty seemed to require that copies of such maps, documents and records should accompany the brief, if they were to form part of the evidence relied on, but, at the same time, I indicated the willingness of this Government to waive any technical objection on account of delay and asked that copies of the evidence referred to be furnished, calling attention particularly to a number of such documents, maps and records, copies of which, or the originals, it seemed to be important that the Government of the United States should see. Of the evidence thus referred to, this Government has since received only the documents accompanying your note No. 139 of June 5 last, although I understand from your note No. 66 of March 11, last, that steps were being taken to procure copies of four of the maps referred to.

"This Government has no desire to object on technical grounds to the production of the evidence referred to, and the production now of the originals or copies of such evidence for the information of this Government will be acceptable; but this Government can not be expected to deal in its reply brief with evidence which it has not had an opportunity to examine, and, unless an opportunity for such examination be given, this Government will be obliged to take the position that the statements and conclusions in the British brief of December 3, 1908, based on the maps, documents and records referred to, are unsupported by evidence." Acting Secretary of State Adee to Ambassador Bryce, No. 730, Sept. 23, 1909, ms. Dept. of State, file No. 839/247. The boundary was ultimately settled by a compromise agreement, without submission to arbitration.

While recognizing that in the treatment of evidence, international tribunals are "not governed by the rigid rules which are applied by domestic courts," the United States contended that certain elementary principles are common to both kinds of tribunals. It asserted that it was not conceivable that in judicial proceedings in the United States, and doubtless likewise in other countries, "counsel would venture to refer to, much less endeavor to support contentions by, evidence either oral or documentary without producing such evidence." The Counter-Memorandum then continued:

"The Arbitral Agreement of January 23, 1925, stipulates for the delivery by each side of a Memorandum containing a statement of its contentions *and the documents in support thereof*. It must be unnecessary to point out that documents can not be withheld from the Memorandum by one side and subsequently be made use of, when the opposing side has answered the Memorandum submitted to the Arbitrator unaccompanied by the documents withheld. It may be mentioned in relation to this point that Article 63 of the Convention for the Pacific Settlement of International Disputes concluded at the Hague in 1907, requires with respect to pleadings that *les Parties y joignent toutes pieces et documents invoqués dans la cause*. Conformably to Article III of the Arbitral Agreement of January 23, 1925, the Arbitrator, after the exchange of Memoranda and the Counter-Memoranda, opportunity having been given for each side to answer the other's Memorandum, including supporting documents, may ask for 'further written explanations.'"²⁹

It may be added that the Arbitral agreement provided with reference to the Counter-Memorandum that it should be accompanied by "any documents in support thereof in answer to the memorandum of the other party." The Netherlands Counter-Memorandum contained the following prefatory note: "The books, maps and documents referred to, of which latter authentic copies are available, will be produced if desired by the Arbitrator."

The Netherlands Government answered the contentions of the United States at some length in its Explanations, which was an optional pleading, as under Article III of the Agreement the case was to be considered closed with the filing of counter-memoranda, unless the Arbitrator applied "to either or both parties for further written explanations." Adverting to the reference made by the United States to Article 63 of the Hague Convention of 1907, the Netherlands said:

"It is of course a question what in every particular case are the 'pieces et documents' concerned. But the rule contained in this article does not direct the submission of docu-

²⁹ The United States v. The Netherlands, Jan. 23, 1925, *Counter-Memorandum of the United States* (Washington, 1926) 2-3.

ments which *prima facie* do not appear necessary, and does not preclude the subsequent presentation of evidence. A party, when preparing its case, has of course to determine the main points which, in its opinion, sustain its contention and what evidence, if any, it desires to adduce in support of its statements, whilst, whether supported by evidence or not, it is for the Arbitrator to decide what weight should be given to them or to ask for additional evidence.

"The convention of 1907 for the pacific settlement of international disputes, far from debarring the Arbitrator from taking into account any further documents or acts which might be useful for a just decision, expressly gives him the right even after the close of the pleadings to take into account such further documents to which the parties might call attention (art. 68) subject to notice being given to the opposite party.

"In an international arbitration, a party will have to incorporate (as provided, with regard to the present case, in article II of the Special Agreement) in its memorandum such documents as in its opinion are required to give adequate support to its contentions. That was what the Netherlands Government did in their first memorandum. Moreover that memorandum contained precise statements of fact which partly did not appear to require corroboration beyond that contained in the memorandum, and partly were not the primary base of the Netherlands contention and, not having been contested, did not seem to require evidence at that stage of the procedure. In their counter-memorandum also, the Netherlands Government gave what they thought was required. If that was not enough, the Arbitrator could ask for more, and in fact did ask for more both with regard to the American and the Netherlands memoranda."

With regard to the United States contention that evidence relied upon must be produced the Netherlands declared:

"If, in a case to be determined in accordance with the rules of civil law and procedure, facts on which the plaintiff bases his claim as the foundation of his right are not disputed by the defendant, they generally do not require proof; they are taken as admitted, and it is for the judge to determine whether the right claimed by the plaintiff does or does not result from these facts. If the defendant denies them, or if the judge for some reason deems it necessary, in conformity with the law of civil procedure, that evidence be given with regard to these facts, he will decide in how far evidence should be presented to him, or he will proceed himself to obtain evidence.

"... The Netherlands Government consider that it is not for them to examine this question as dealt with in the

municipal courts of the United States, but they submit that elsewhere references to available evidence and declarations as here referred to are being made every day in civil lawsuits. See, e.g., *Deutsche Zivilprozessordnung* par. 130 no. 3, 4, and 5, par. 272, 282 and 350, all of which are inspired by the principle that a party has to give a clear statement of the facts and of the evidence ('Beweismittel') which eventually he will produce; but it will depend on the circumstances of any particular case whether the submission of evidence will be necessary. See also article 34 of the French Code de procedure civile, which prescribes evidence to be given by witnesses in respect of facts 'dont le juge de paix trouve la verification utile et admissible'. The 'Civilprozessordnung' for the Swiss Canton of Basel-Stadt says in section 98: 'Tatsachen, worüber dem Richter Gewissheit nötig ist, muss derjenige Teil beweisen der solche für sich anführt and ein rechtliches Begehren darauf stützt', and section 289: 'Hier-nächst entscheidet das Gericht, ob in der Sache ein Beweis zu führen ist, und, bejahenden Falls, von welcher Partei and welche Tatsachen.'"³⁰

The Netherlands Government said that the note was inserted in its Memorandum "as a natural and simple matter," and that there was behind it no "sinister design to prejudice the other party's position," and that, at any rate, such an intention would have been futile "in view of Article III of the special agreement prescribing that, whenever the arbitrator asks for further documents, the other party shall be given the opportunity to examine them." It said that in including the note in the Counter-Memorandum "all they had in mind was that books and maps, although being public property and capable of consultation by everyone, might be considered as objects which it might be inconvenient for the Arbitrator to obtain," and that it desired to offer its services in obtaining for the Arbitrator anything mentioned in its memorandum.³¹

While the Netherlands had stated in its Explanations that the divergency between the two Governments was "not so great as might appear at first sight," the United States declared in its Rejoinder that the divergency was "very great." With reference to the time at which evidence should be presented the United States said:

"The Memorandum is the pleading by which a party makes its case, it being required by the Arbitral Agreement that the Memorandum filed by each party shall contain 'a statement of its contentions and the documents in support thereof.' Such being the terms of the Arbitral Agreement, it

³⁰ *Explanations of the Netherlands Government* (The Hague, 1927) 5, 6, 9, 10.

³¹ *Ibid.* 12.

is difficult to understand the Netherland Government's reasoning that it is only by the Counter-Memoranda that each party can know the attitude of the other party. It was not necessary for either party to file a Counter-Memorandum, and under the Arbitral Agreement a Counter-Memorandum if filed is a pleading 'in answer to the Memorandum of the other party.' How could one party acting conformably to the Netherland Government's theory, answer the other party's Memorandum if it is only by the Counter-Memoranda that each party can know the attitude of the other party? The Arbitrator might have decided the case, had he chosen to do so, without calling for further explanations, and therefore a Memorandum of unsupported allegations could not be filed by a party with the expectation that the Arbitrator in asking for further explanations would 'call for evidence.' "

The United States observed further that the theory expounded by the Netherlands Government would "if given effect apparently make it the duty of an arbitrator to prepare a record of evidence rather than to pass upon a record submitted by a litigant."³²

The opinion of Judge Huber, sole arbitrator, concerning this conflict of views is of great interest, but not decisive as to the merits of the question as he concludes by saying that he had relied upon "no documents which are not on record" except one treaty which was "of public notoriety and accessible to the Parties," and that "no allegation not supported by evidence" was "taken as foundation for the award." Concerning the effect of the time of the submission of evidence on the right of the tribunal to receive it, the Judge said:

"The provisions of Article II of the Special Agreement to the effect that documents in support of the Parties' arguments are to be annexed to the Memoranda and Counter-Memoranda, refers rather to the time and place at which each Party should inform the other of the evidence it is producing, but does not establish a necessary connection between any argument and a document or other piece of evidence corresponding therewith. However desirable it may be that evidence should be produced as complete and at as early a stage as possible, it would seem to be contrary to the broad principles applied in international arbitrations to exclude *a limine*, except under the explicit terms of a conventional rule, every allegation made by a Party as irrelevant, if it is not supported by evidence, and to exclude evidence relating to such allegations from being produced at a later stage of the procedure.

"The provisions of the Hague Convention of 1907 for the peaceful settlement of international disputes are, under Article 51, to be applied, as the case may be, as subsidiary

³² *Rejoinder of the United States* (Washington, 1927) 3-4, 11.

law in proceedings falling within the scope of that convention, or should serve at least to construe such arbitral agreements. Now, Articles 67, 68 and 69 of this convention admit the production of documents apart from that provided for in Article 63 in connection with the filing of cases, counter-cases, and replies, with the consent or at the request of the tribunal. This liberty of accepting and collecting evidence guarantees to the tribunal the possibility of basing its decisions on the whole of the facts which are relevant in its opinion.

"The authorization given to the Arbitrator by Article III of the Special Agreement to apply to the Parties for further written Explanations would be extraordinarily limited if such explanations could not extend to any allegations already made and could not consist of evidence which included documents and maps. The limitation to written explanations excludes oral procedure; but it is not to be construed as excluding documentary evidence of any kind. It is for the Arbitrator to decide both whether allegations do or—as being within the knowledge of the tribunal—do not need evidence in support and whether the evidence produced is sufficient or not; and finally whether points left aside by the Parties ought to be elucidated. This liberty is essential to him, for he must be able to satisfy himself on those points which are necessary to the legal construction upon which he feels bound to base his judgment. He must consider the totality of the allegations and evidence laid before him by the Parties, either *motu proprio* or at his request and decide what allegations are to be considered as sufficiently substantiated."³³

³³ *Arbitral Award*, April 4, 1928 (The Hague, 1928) 19-20.

During the discussion in the 1936 Revision of the Rules of the Permanent Court of International Justice of the provisions in Article 40 of the 1931 Rules that documents in support should be attached to the pleadings, a difference of opinion appeared as to the meaning of that requirement. The President said that it had been the practice for the Court to call for copies of all documents adduced or cited by a party, but that he "thought it better that the document should be attached to the Case from the outset."

"M. Urrutia feared that this requirement might result in the submission of very voluminous cases.

"The President thought that, even if it made the Cases more bulky, it was better that the documents in support should be attached to the Case.

"M. Fromageot drew a distinction between documents in support (*pieces justificatives*) and texts that were cited. It was reasonable to expect that all documents in support and also texts actually cited should be attached to the Case; but one would not expect the whole of a legal code, a treaty, or a legal treatise, to be so attached. He feared that the word 'documents' might be held to include the latter also. He thought that the word 'text' would be sufficiently restrictive.

"M. Urrutia accepted M. Fromageot's proposal, if it were limited so as to apply only to 'documents in support' (*pieces justificatives*).

"M. Guerrero, Vice President, supported this proposal. What was essential for the members of the Court was to have before them the evidence submitted by the parties. The citing of other texts might be of assistance, but it was not necessary to enable the Court to give its decision." Series D, No. 2 (3d Add.), p. 101.

The question thus so fully elucidated in this case is of fundamental importance. As stated in the preceding section, the propriety of the contested conduct of the Netherlands Government in this case must be tested by reference to the terms of the arbitral agreement. It is to be doubted whether the procedure of the Netherlands Government in referring to documents without attaching copies to the Memorandum, attaching only "the more important of the documents," and submitting those withheld later with an optional pleading called for by the Arbitrator, constituted any transgression of a limitation imposed by the arbitral agreement.³⁴ The provisions in Article II of the special agreement that the "documents in support" be presented with the Memorandum, and "any documents in support in answer to the Memorandum of the other party" with the Counter-Memorandum would seem, reasonably construed, to contemplate that all relevant affirmative evidence be submitted with the Memorandum. Nevertheless, the parties are necessarily left with some discretion in determining what is relevant. As the Netherlands Government put it, "the rule contained in this article does not direct the submission of documents which *prima facie* do not appear necessary." In the absence of a specific provision prohibiting the admission of affirmative documents not submitted with the original instrument of the pleadings, the Arbitrator is hardly in a position, so long as the parties act in good faith, to refuse to accept evidence submitted at a later stage of the proceedings.

As the instant case developed, the production of most of the documents not submitted with the Memorandum proved to be necessary to a proper disposition of the case. Granted that the Netherlands Government acted within its rights under the rules, it seems fairly clear that the late filing of evidence on such a large scale is not in the interest of fair and orderly procedure.³⁵ At best it tends

³⁴ A modified form of the procedure followed by the Netherlands Government in this case appears to have been resorted to by the United States in the *Norwegian Claims* case. The practice as described in the Case of the United States hardly seems open to exception, but might be subject to abuse:

"Certified copies of all documentary evidence printed in the Case or Counter-case of the United States, duly authenticated, will be produced at the trial, in accordance with Art. 64 of the Hague Convention for the Pacific Settlement of International Disputes.

"Frequently papers which have been printed as documentary evidence in the Appendix to the Case of the United States, refer to other documents either as enclosures or otherwise, which if obtainable do not appear to be sufficiently material to warrant their inclusion in the printed documentary evidence submitted to the Tribunal. An effort has been made, however, to call attention to the omission of such documents and to secure the originals or certified copies thereof, which if so obtained are held by the Agent of the United States subject to the call of the Tribunal." *United States v. Norway*, June 30, 1921, *Case of the United States* (Washington, 1922) 6.

³⁵ See comment of the Agent of the United States, Nielsen's Report (1928) 38-39. See also secs. 272 and 283 of the German Code of Civil Procedure of 1933 for provisions designed to prevent delays in the submission of evidence.

unduly to prolong the proceedings. It puts a heavy burden on the opposing party by confronting him with the necessity of analyzing and rebutting a large mass of evidence at a late stage in the proceedings.

Further, it is possible under such rules for a party to put too great a burden on the arbitrator with reference to the development of the evidence in the case. Although it is undoubtedly sound practice to vest in the arbitrator discretionary power to require the production of evidence in addition to that submitted by the parties, a procedure is not well conceived which makes it possible to place the primary burden upon the arbitrator to determine what evidence shall be produced by a party to make out its case. The right of the arbitrator to demand further evidence should always be an exceptional power designed to enable him to supplement the evidence submitted by the parties, not to place upon him the burden of determining what contentions made by the parties shall be supported by evidence.

Such a practice in the production of evidence as that adopted by the Netherlands Government in this case is, of course, not in harmony with the principles and practice of Anglo-American law. It was apparently adapted by the Netherlands Government from the practice in civil law procedure of the parties "offering" evidence, the court deciding what evidence it will entertain, thus relieving the parties of the burden of proving facts which the court may consider immaterial. Nevertheless in the civil law, despite the discretionary power thus vested in the courts, the primary burden of establishing his case rests upon the party himself.³⁶ He must make out a *prima facie* case to warrant a judgment in his favor. This may be done in municipal law without bringing forward supporting evidence when there has been no denial of alleged facts, but in international proceedings such a case can only be established by submitting evidence sufficient to enable the tribunal to determine that the claim of right put forward is properly made out.³⁷

In any event, such procedure should not, in general, be perpetuated in international adjudications. With the exception of the Permanent Court of International Justice, there are not at present

³⁶ Bonnier, *op. cit.* 27-34; Henri Capitant, *Introduction a l'etude du droit civil. Notion générales*, Troisième édition. Paris, 1912, pp. 349-351. Art. 1315 of the French Civil Code provides:

"He who claims the performance of an obligation must prove its existence.

"Reciprocally, he who claims that he has discharged an obligation must prove payment or the fact which has extinguished his obligation." Translation from Bodington, *op. cit.* 133.

³⁷ Cf. Article 53 of the Statute of the Permanent Court of International Justice, Appendix I.

in international proceedings the safeguards inherent in a permanent judiciary and a well developed system of procedure which obtain in municipal proceedings.³⁸

States in establishing *ad hoc* tribunals need to perceive clearly that if they wish to curtail the later submission of documentary evidence, specific limitations on the right of such submission must be embodied in the arbitral agreement.³⁹ Past practice indicates that such a limitation on the discretionary rights of the parties and the tribunal, might be expected in most cases, to promote the expeditious and orderly disposition of cases, and would remove a possible source of injustice. The right of the tribunal of its own motion to call for such further evidence in addition to that submitted by the parties as it deemed necessary to elucidate particular points would need to be carefully safeguarded.⁴⁰

Section 16. During the Oral Proceedings: General Practice. With reference to the time of the presentation of evidence, there remains to be considered the extent to which it may be presented during the oral proceedings, or subsequent to the written proceed-

³⁸ For comment on the aspect of the *Palmas Island* case discussed in this section, see Philip C. Jessup, "Palmas Island Arbitration," 22 A.J.I.L. 750-752 (1928); W.J.B. Versfelt, *The Miangas Arbitration*, Utrecht, 1933, pp. 136-142.

³⁹ On March 18, 1938, the Netherlands and the United States signed a Convention (Proclaimed by the President of the United States on Aug. 15, 1938) providing for the arbitration of the question of the amount due to the Government of the Netherlands for certain military supplies requisitioned by the United States in 1917. The provisions concerning the time of the production of evidence included in Article I of the Convention have apparently been adopted with the experience in the *Palmas Island* case in mind. Article I provides for an exchange between the Agents of the two Governments of a Memorial, Answer, Brief, and Reply Brief, respectively. It is provided that the Memorial "shall be accompanied by all the evidence upon which the claim is considered to be based, it being clearly understood that no further evidence may be injected into the case either during the discussions mentioned in Article II below or during the possible adjudication of the claim, except as hereinafter provided." A similar provision is made with reference to the Answer. Evidence filed with the Brief is limited to "only such evidence as is strictly in refutation of the Answer or of the evidence filed with the Answer," and evidence filed with the Reply Brief is likewise limited to such as is "strictly in refutation of the Brief or the evidence filed therewith." Article II provides for reference of the case to arbitration in the event that the two Governments shall be unable to reach an agreement for the disposition of the claim, and adds that "in no event shall . . . the written record above described [be] augmented in the event the matter is so referred to arbitration." Provision for oral argument is made in Article VI, but the Arbitrator is given no authority to require the production of further evidence. (Treaty Series No. 935.)

⁴⁰ Cf. text of Article 6(d) of the Protocol of April 24, 1934, between the United States and Mexico, *supra*, pp. 36-37.

The limitation might take the form of a provision that there be filed with the case all evidence which the party intends to rely on in support thereof, with the proviso that any supporting evidence offered later be disregarded unless submitted with the permission of the tribunal, given after hearing the parties. Under such a provision the documents submitted with the subsequent pleadings would be limited to evidence in rebuttal.

ings, if there be no hearings before the tribunal. The question is confined principally to documentary evidence, oral evidence being produced either through the examination of witnesses during the oral proceedings which is quite rare, or in the form of depositions taken out of court. The latter is, in a sense, a form of documentary evidence, and is subject to the same rules so far as submission during the oral proceedings is concerned.

It is apparent from what has already been said concerning the time of the production of evidence that, in general, it is the intent of arbitral agreements and of the rules of procedure issued by tribunals that the mass of the evidence shall be produced in writing during the proceedings prior to argument. The submission of evidence at a later stage is intended to be exceptional.⁴¹ However, since the arbitral agreement rarely precludes absolutely the later submission of evidence, parties frequently resort to this means of getting evidence before the tribunal which had previously been overlooked, could not be found earlier, or which, during the course of the proceedings, assumes an importance not apparent during earlier stages of the proceedings. It becomes important, therefore, to determine the limits assigned to such submission.

Submission during the oral proceedings is essentially a privilege rather than a right, since the reception of evidence at that stage rests largely in the discretion of the tribunal. Thus the Hague Convention of 1907 provides in Article 67 that "after the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party." Baron Descamps, reporting to the First Hague Conference for the Third Committee, asserted that "foreclosure [of evidence offered] seems to be a grave measure which should not be followed except with a full appreciation thereof."⁴² The principles comprised in these articles have been adhered to in most of the arbitrations conducted under this convention and that of 1899, which contained identical provisions in Articles 42 and 43. Nor were the principles new. For example, almost identical provisions were embodied in Articles 8 and 9 of the rules of procedure adopted by the Tribunal established for the determination of the boundary between British Guiana and Venezuela.⁴³

⁴¹ See, for example, the provision in Article 34 of the Rules of the German-Belgian Mixed Arbitral Tribunal that after the written proceedings have closed "nouveau moyens de preuve ne seront qu'exceptionnellement admis." 1 *Recueil des décisions* 37. Others of the Tribunals adopted analogous rules. See *Recueil des décisions*, vol. 1, *passim*.

⁴² *Hague Conference Reports*, p. 81. See also *ibid.* 346-347. Cf. Article 68 of the Convention and comment in *Hague Conference Reports*, pp. 81-82. For text of Article 68 and of Articles 42 and 43 of the Convention of 1899, the articles corresponding to Articles 67 and 68, see Appendix IV.

⁴³ 92 Br. and For. Stat. Paps. 466-469 (1899-1900).

Baron Descamps in his report just referred to intimated it to be the view of his committee that under Article 67 the tribunal could not refuse to receive evidence offered with the consent of all parties to the proceedings. While it may well be doubted whether a tribunal is bound to receive evidence to which all parties have consented, it is nevertheless true that evidence offered upon the basis of such consent is usually admitted.⁴⁴ It was the practice of the British-Venezuelan Tribunal of 1899 to receive documents submitted during the oral proceedings by mutual consent of the parties.⁴⁵ Likewise with the consent of the United States, the American-Norwegian Tribunal of 1921 admitted certain documents which Norway alleged were necessary to answer certain charges of bad faith appearing for the first time in the countercase of the United States. Certain further evidence was admitted at the request of the United States.⁴⁶ During the oral proceedings in the *Carthage* and *Manouba* cases the French Agent submitted on the question of damages "(1) the supporting documents submitted to the Government of the Republic by the Compagnie Generale Transatlantique referred to in the Memorandum in the Annexes to the French Memoir, Document No. 25; (2) the 101 dossiers containing the claims cited in Document 26 of the Annexes to the French Memoir." In giving his consent to the admission of these documents the Italian Agent observed:

"The Italian Agent believed it necessary to remark, first, that the documents and proofs on which reliance is to be placed, should be introduced, according to the terms of the Arbitral Compromis (Art. 3), at the same time as the Memoirs to which they relate; those Memoirs can hardly serve on the contrary for announcing the prospective deposit of certain documents with the Secretariat of the Tribunal to be placed at the disposition of the Royal Government. According to the demands now being formulated by the Tribunal, it seems that this deposit, of which he declared he had received no notice, had not yet been made.

"He declared that he did not desire however to raise any objection to the Tribunal authorizing the production of these documents and proofs; he added that it naturally remained well understood that he reserved full right of proceeding to any examination and inquiry useful or necessary for understanding the contents as well as producing, in rebuttal, the documents which he believed necessary to that end."⁴⁷

⁴⁴ Cf. discussion of the practice of the Permanent Court of International Justice in sec. 17, *infra*. Evidence may on occasion be admitted by reciprocal agreement of the parties subject to the confirmation of the Tribunal. *Grisbadarna* case (Norway v. Sweden), March 14, 1908, *Recueil des comptes rendus*, etc. (The Hague, 1909) 3.

⁴⁵ *Proceedings* (1899), vol. IV, p. 867.

⁴⁶ *Proceedings* (1922) 16-35, 100.

⁴⁷ *Protocoles, des Séances et Sentences* (The Hague, 1913) 45, translation. During the *Venezuelan Preferential* case proceedings, Sir Robert Finlay

A modified form of consent is sometimes given, leaving the actual decision of the question to the tribunal. In the *Geneva Arbitration*, between the United States and Great Britain under the Convention of May 8, 1871, Lord Tenterden offered evidence concerning ships being built for the Emperor of China in 1863, explaining that the importance of the evidence had only become apparent during the argument of the United States on the case of the *Georgia*. Mr. Bancroft Davis observed that while he found nothing of importance in the documents, he could find no authority in the arbitral agreement for their introduction at this stage, and that he would "leave the tribunal to act upon the application as in its judgment it may see fit." The Tribunal decided to receive the documents.⁴⁸ During the oral argument in the *North Atlantic Coast Fisheries* case, the Attorney General, speaking for Great Britain, objected to the submission by the United States of a copy of the Proceedings of the *Halifax Commission* of 1877, but later withdrew his objection, saying that he was "quite prepared to trust the Tribunal," and that he would not like to have it said that he "objected to the admission of any documents whatever."⁴⁹

Tribunals not infrequently undertake to pass on the admissibility of evidence offered during the oral proceedings without ref-

demanded that the other parties be supplied with copies of a statement by Mr. Bowen, American Minister to Venezuela, read by Mr. Penfield. Mr. Penfield offered to withdraw it, but upon Sir Robert's insistence that it was too late, the Tribunal decided that "considering that, according to the rules of the Hague convention, every document produced with whatever object by one of the parties must be communicated to all the others; . . .

"That copies of this document shall be communicated by Mr. Penfield to the other parties." The Tribunal had specifically ruled at the beginning of the oral proceedings that after the close of the pleadings "the parties can present no acts or documents except with the special permission of the Tribunal and with the condition that they shall communicate them to all the other parties." *Proceedings* (1905) 62, 81.

⁴⁸ 1872 For. Rel., pt. II, vol. 4, pp. 33-34.

At a later session, Lord Tenterden objected to the admission of certain statistical tables concerning damages submitted by the United States, alleging that new statements could only be introduced after the close of the regular written pleadings upon the request of the arbitrator. The Tribunal gave the following decision:

"The Tribunal does not see fit to order the withdrawal of the tables presented on the part of the United States . . . ; but it declares that it considers these documents only as simple elucidations, such as were required by one of the arbitrators, . . . to which the Tribunal will give such attention as is right." *Ibid.* 36, 42.

⁴⁹ *Proceedings* (1912), vol. 11, pp. 2219, 2223, 2234. The Attorney General had stated during the course of the rather lengthy colloquy with Mr. Root on the point that he was "only objecting to having a great mass of evidence put before the Tribunal at the very last moment when it is impossible for anyone, to deal with it effectively." Cf. *supra*, p. 39.

See also *Pious Fund* case (United States v. Mexico), *Recueil des Actes et Protocoles* (The Hague, 1902) 89-96; *Salvador Commercial Co.* case (United States v. Salvador), Dec. 19, 1901, *Shorthand Report of Proceedings*, ms. National Archives of United States, book 5, pp. 1-2. In the latter case counsel for Salvador stated that although the Court had the right to admit anything, they would nevertheless object to anything which was new "which did not exist at the time the protocol was signed."

erence to the consent of the opposing party. The Tribunal in the *Chamizal Arbitration* ruled that documents might be introduced during the proceedings, but that in such cases opposing counsel should have the right to discuss them.⁵⁰ During the hearings before M. Asser of the *Whaling and Sealing Claims* against Russia, counsel for the United States contended that it was not permissible to produce new documents, the evidence having been set forth in the written pleadings. Counsel for Russia maintained, on the contrary, that when the Arbitrator asked for supplementary information to be given verbally, the verbal explanations might be accompanied by documentary evidence as well as if the information were furnished in writing. The Arbitrator decided that "the delegate of the Russian Government may be free to give his statement of the case the form which he deems necessary."⁵¹ On a similar objection in the *Fur Seal Arbitration* case the President announced that "the Tribunal would permit the documents to be read, but reserved to itself for further consideration the question of their admissibility as evidence."⁵² So long as the interests of the opposing party will not be unfairly prejudiced, such party having a fair opportunity to answer the evidence offered, and the timely disposition of the case will not be endangered by the admission of the evidence, tribunals are not inclined to refuse admission to evidence which promises to throw needed additional light on controverted points.⁵³

⁵⁰ *Memoria documentada del juicio de arbitraje del Chamizal* (Mexico City, 1911), vol. I, pp. 443, 457, 468.

The rules of a number of the Mixed Arbitral Tribunals established under the peace treaties at the end of the World War contained a provision substantially similar to the following from the Franco-German Rules: "Art. 48. Le tribunal peut écarter du débat tous actes et documents qui n'auraient pas été produits à l'instruction écrite." 1 *Recueil des décisions* 51.

⁵¹ 1902 For. Rel., Appendix I, p. 409. Counsel for the United States added after this ruling that "in his opinion the introduction of new testimony was not regular, and he wished to reserve the right to object to the introduction of new documents." *Ibid.* 413.

⁵² *Proceedings, Fur Seal Arbitration* (1895), vol. I, p. 45.

⁵³ *Pradel* case (United States v. Mexico), July 4, 1868, VII ms. *Opinions* 108-110, 478; *Singer Sewing Machine Co.* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1928-1929) 124-126 (Concurring opinion of Commissioner Nielsen). See also *Orinoco Steamship Co.* case (United States v. Venezuela), Feb. 13, 1909, *Protocoles des Séances* (The Hague, 1910) 51.

During the oral argument of the *Fishing Claims, Group I*, before the United States-British Claims Commission of 1910, certain affidavits having been submitted in evidence, Mr. Nielsen, Agent for the United States, objected rather strenuously to their admission, asserting that they could have been introduced much earlier, and that it was not proper for the United States to be surprised by their introduction at this late date. The Tribunal admitted the affidavits. Mr. Nielsen reviewed at some length previous action of the Tribunal in the *Rio Grande* case in which a Reply filed late by Great Britain, with voluminous accompanying evidence, had been gotten in by his suggestion that the Commission order the production of further evidence on both sides. He further adverted to a statement he had made in the *Brown* case concerning evidence withheld by Great Britain until the oral argument, which he alleged could have been submitted earlier, thus depriving the United States of a fair opportunity to answer it. Nielsen's Report (Washington, 1926) 555-564.

Tribunals in the exercise of their discretion reject evidence if submitted so late as to make its admission unfair or inexpedient.⁵⁴

Section 17. The Same: Practice in the Permanent Court of International Justice. Both oral and written evidence may be submitted during the oral proceedings in the Permanent Court of International Justice after the time limits specified for such submission, but only as an exceptional measure. It is clearly contemplated by the Statute and Rules that all available evidence in support shall be submitted with the various instruments of the pleadings.⁵⁵ As previously pointed out, the Court decides whether the testimony of witnesses, if any is to be submitted, shall be taken before or after the oral arguments.⁵⁶

The Court may after it "has received the proofs and evidence within the time specified for the purpose . . . refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents." Basing its action upon practice developed in the application of this provision of Article 52 of the Statute, the Court implemented it in revising its rules in 1936 by the addition of a new rule, Article 48:

"1. Except as provided in the following paragraph, no new document may be submitted to the Court after the termination of the written proceedings save with the consent of the other party. The party desiring to produce the new document shall file the original or a certified copy thereof with the Registry, which will be responsible for communicating it to the other party and will inform the Court. The other party shall be held to have given its consent if it does not lodge an objection to the production of the document.

"2. If this consent is not given, the Court, after hearing the parties, may either refuse to allow the production or may sanction the production of the new document. If the Court sanctions the production of the new document, an opportunity shall be given to the other party of commenting upon it."

⁵⁴ *Muscat Dhows case* (France v. Gt. Britain), Oct. 13, 1904, *Recueil des Actes et Protocoles* (The Hague, 1905) 37, 40; *Venezuela Preferential case* (Germany, Gt. Britain and Italy v. Venezuela), May 7, 1903, *Recueil des Actes et Protocoles* (The Hague, 1904) 91.

⁵⁵ See Art. 43 of the Statute, Appendix I, and Arts. 62 and 72 of the 1936 Rules, Appendix II.

⁵⁶ *Supra*, pp. 32-34. See, for example, the following statement from the Digest of Decisions taken by the Court:

"In the case concerning the administration of the Prince von Pless, the Case filed contained but one annex. Having regard to the terms of Art. 40, para. 1, head 4, of the R., [1931 Rules] the court decided to call upon the Agent for the applicant Government to produce all documents which were cited in the Case and which had not previously been filed; these documents were to be submitted in the form of a supplementary volume within a fixed time. It was nevertheless understood that the Case should be held to have been filed within the prescribed time-limit." Series E, No. 9, p. 168.

During the course of the preparation of the 1936 Rules, this rule was the subject of rather lengthy discussion. The Registrar reported that in practice the Court had always accepted a new document if no objection were lodged by the other parties.⁵⁷ In commenting upon the text of the rule as proposed by the Drafting Committee,⁵⁸ the President said that the Committee had tried to keep in mind the Anglo-American system as well as that prevailing on the continent of Europe since "if the Article did not stress the fact that the Court had power in all circumstances to reject the document without first examining it, it would give rise to misgivings in Anglo-American legal opinion . . ." ⁵⁹ He further stated that one of the principal purposes of the rule was to give the Court sufficient latitude to enable it "to short-circuit the possible bad faith of a party, who might, for instance, try without justification to delay as much as possible the moment at which it produced an important document." The proposed draft made it possible, he said, "in such circumstances to refuse to accept the document—that was to say inflict a penalty—without having seen it."⁶⁰

The Court considered it important to require that the parties should give explanations in open court "on the one hand to justify the late submission of a document and, on the other for withholding consent to its production."⁶¹

As previously pointed out, the Court under Article 50, determines the time at which the testimony of witnesses, if any, shall

⁵⁷ Series D, No. 2 (3d add.), p. 191.

⁵⁸ See *ibid.* 168, and for other texts considered, see *ibid.* 123, 170.

⁵⁹ *Ibid.* 191. It had been strongly urged by certain members of the Court that it was impossible to decide whether a document should be accepted without first examining it. Baron Rolin Jaequemyns said:

" . . . with regard to the substance of the question, it would be impossible for him as a judge to decide as to the relevance of a document without seeing it. In such a case he would always demand the production of the document.

"It was possible to imagine a system according to which, at a certain stage of the proceedings, no fresh document might be produced. But in a Court like this, a greater latitude must be allowed. And it was essential that judges should be acquainted with all that happened." *Ibid.* 191.

M. Guerrero, Vice President, "thought that the members of the Court would, in any case, inevitably have to become acquainted with the document, either because the party concerned had given its consent to its production, or because it had refused its consent; for, in the latter case, the Court would certainly be compelled to examine the document in order to decide whether to give or refuse its authorization." *Ibid.* 131.

In the Drafting Committee two views had been expressed on this point, but the Committee "had thought it important to make it possible for the Court to refuse to accept the new document without having seen its contents," and had accordingly "refrained from prescribing in paragraph 1 that the Registrar should at once communicate the new document to the judges and had simply provided that the Registry should inform the Court of the submission of the document." *Ibid.* 189-190.

⁶⁰ *Ibid.* 191. Cf. *supra*, sec. 15.

⁶¹ *Ibid.* 197. The words "after hearing the parties" were accordingly inserted in the second paragraph of the text of Article 48 as proposed by the Drafting Committee.

be taken during the oral proceedings.⁶² However, the Rules place upon a party the obligation of informing the Court and the other parties, "in sufficient time before the opening of oral proceedings . . . of all evidence which it intends to produce, together with the names, Christian names, description and residence of witnesses whom it desires to be heard." During the revision of the Rules in 1936, a modified version of this Article was proposed. It was intended to govern specifically the formalities necessary when a request to produce oral evidence is presented after the opening of the oral proceedings, and made the consent of the other party a prerequisite to the admission of such oral evidence. If that consent should be refused, the Court would decide the question of admission after hearing the parties.⁶³ This proposal was objected to on the ground that it might be considered to require the Court always to give a decision on a request to produce oral evidence "after considering whether the proposed evidence was legally admissible and relevant." It might be very difficult, it was contended, for the Court to say "a priori, in regard to the evidence of a particular witness whether it was relevant or not," and it would be better not to adopt any rule "which might prejudice the action of the Court in connection with evidence." It was accordingly decided to retain the existing text.⁶⁴ In the absence of a specific provision on the

⁶² Judge Fromageot declared in the course of the debate on the revision of the Rules in 1936: "The hearings were however under the direction of the Court. In a particular case, the argument of the question of law might completely elucidate the dispute and render the hearing of witnesses unnecessary. In such a case, although theoretically it might be said that a party was entitled in any event to call its witnesses, a practical view of the matter must be taken, and it would be inconceivable that the Court should be unable, in the exercise of its power of direction, to inform a party that its evidence had, as a result of the argument of the case, ceased to serve any purpose. That could be described as an appraisalment of the relevance of evidence. On the other hand, under the system of the existing Statute and rules of procedure, it was somewhat difficult to think of cases, such as were to be found in various systems of municipal law, where the evidence of a witness would be legally inadmissible." *Ibid.* 267.

⁶³ The text of the Article as proposed, drafted by the Drafting Committee with the assistance of M. Schücking read:

"In sufficient time before the oral proceedings, each party shall notify the Court of all oral evidence of witnesses or experts which it intends to ask the Court to take.

"After the opening of the oral proceedings, a request for permission to produce such evidence can not be granted without the consent of the other party, unless the Court, after hearing the parties decides otherwise.

"The party concerned shall notify the names, Christian names, description and residence of witnesses or experts whom it desires to hear. It shall further give a general indication of the point or points to which the evidence is to refer." Series D, No. 2 (3d add.), p. 266.

⁶⁴ Article 49, 1936 Rules, *Ibid.* 267-272. See text, Appendix II.

"M. Anzilotti pointed out that, underlying both the existing Article 47 and the new draft, was the fundamental distinction between evidence which a party produced itself on its own responsibility and evidence which required the co-operation of the Court. The free hand left to the parties by Article 52 of the Statute as well as by Article 54, only related to evidence in the first category. Just as a party could submit any document without the Court being

matter, therefore, it seems clear that a party may offer new oral evidence not previously notified, but that the Court retains discretion as to the reception of such evidence.

The first instance in which the Court made a formal ruling refusing to accept a document in pursuance of Article 52 of the Statute was its order of August 19, 1929, in the case of the *Free Zones of Upper Savoy and the District of Gex*. The right to take such action had been established, however, by the previous practice of the Court in less formal rulings.⁶⁵ The Court recited in its order

able to say that it would not accept it, so also it could call witnesses or experts who might be regarded as 'living documents.' On the other hand, when the Court had, for instance, to arrange for an expert report, the principle was quite different: it was no longer a question of evidence produced by a party but of evidence which had to be obtained by the Court. The only evidence which a party could adduce as of right was that which it produced itself. In M. Anzilotti's view, the new version of Article 47, like the old, possessed all the necessary flexibility and did not even preclude the other party from lodging an objection, if in a particular case it had legal grounds for so doing. With regard to the question of relevance, it was impossible for the Court to decide without having first heard the evidence. Article 45 of the Rules, however, made it possible for the Court to direct that the parties should first of all argue the case.

"The President gathered that a solution which would be generally acceptable to all members of the Court would be to retain the existing text of Article 47. As a matter of fact, the Drafting Committee and, before it, the Co-ordination Commission, had never meant to abandon the essential features of that text, but simply to make certain improvements in it."

⁶⁵ "In the *Mavrommatis* case (merits), in 1925, the President, when terminating the hearing, refrained from declaring the proceedings closed in order to enable the Court, if necessary, to ask the Parties for additional information. When, however, the Greek Agent asked to be permitted to produce further documents and information, it was observed at the sitting held to consider this point that the Court could ask for further information, but that no new evidence could be produced without the consent of both Parties.

"On May 3rd, 1926, in the case concerning certain German interests in Polish Upper Silesia, the Court, being in deliberation on this case, decided to disregard certain observations submitted by the Agent of the Polish Government and received on May 3rd, concerning documents filed by the German Government between February 23rd and 28th, on the ground that these observations had been received too late.

"On June 15th, 1926, documents submitted after the date fixed by an international organization, in connection with Advisory Opinion No. 13, were accepted by the Court, but it was understood that this decision should not create a precedent.

"On August 4th, 1924, the Court decided not to re-open the proceedings, which had already been closed in regard to Advisory Opinion No. 9, for the purpose of hearing additional information which the Serb-Croat-Slovene representative desired to submit. In accordance with this decision, the Registrar was instructed to return a letter sent by the S.H.S. representative in reply to a note submitted by the Albanian representative on a particular point on which the Court had asked the Parties to furnish information. An Albanian reply to the Corresponding Serbian note was also returned." Series E, No. 3, p. 215.

"At the hearing of a case at the Sixteenth (Extraordinary) Session, the Agent of one Party, after the termination of the hearing, filed a note and annexed document. The Agent for the other Party objected, contending that this proceedings should be considered null and void. As, however, the filing of the annexed document had been announced by the Agent for the first Party in his oral reply and had actually taken place during the oral reply of

that the Agent for the Swiss Government, during the proceedings on July 13, had filed a volume entitled, *Publications des Comités suisses en faveur du maintien des zones franches de 1815 et 1816*; that the French Agent had objected to the Court receiving the volume as evidence; that the Swiss Agent left the decision to the Court, and continued:

"Whereas according to Art. 52 of its Statute, 'after the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one Party may desire to present unless the other side consents';

"Whereas the extracts from the said volume read by the Agent for the Swiss Government during the hearings are not necessary at the present stage of the proceedings to enable the Court to form its opinion upon the question submitted to it by Article I, paragraph 1, of the Special Agreement;

"The Court excludes as evidence at the present stage of the case the *Publications des Comités suisses en faveur du maintien des franchises de 1815 et 1816*, filed at the hearing of July 13, 1929." ⁶⁶

In the case of the *Legal Status of Eastern Greenland*, the Agent and Counsel for the Norwegian Government having adduced certain new documents in the course of his oral rejoinder, the Danish Agent, invoking Articles 48 and 52 of the Statute asked that the Court refuse to accept the "fresh facts adduced in the rejoinder." As the Norwegian Government had also made certain reservations with respect to new documents used in the Danish oral reply, "the Court reserved the right to refuse the fresh documents produced on either side . . . and to give the Danish Agent an opportunity of presenting observations on the fresh documents produced in the rejoinder." After the Agent for Denmark had commented on the documents, he withdrew his Government's objection to their admission, and the Court accordingly declared "that, in so far as the terms of Article 52 of the Statute are applicable to the evidence produced by one of the Parties to the case, the consent

the Agent for the second Party, the Registrar held the annexed document at the disposal of members of the Court; he did not, however, communicate to them the terms of the note." Series E, No. 6, p. 297.

"On May 23rd, 1929, at the Sixteenth (Extraordinary) Session, the President having asked the Agent for one Party whether he intended to make an oral rejoinder, Counsel for the latter, when stating his intention to do so, observed that the other side had produced new documents and accordingly asked for a short delay (half a day) to enable him to deal with these new documents. The President granted this request in accordance with the usual practice of the Court in such circumstances." *Ibid.* 296.

⁶⁶ Series A, No. 22, pp. 14, 21.

of the other Party, which is required under that Article, may be regarded as having been obtained."⁶⁷

In the course of the oral proceedings in the case of the *Appeal from Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal*, the submission of evidence during such proceedings under Article 52 of the Statute was the subject of extended debate, and the position of the Court on the matter was fully restated in its judgment. Each party filed new documents with the consent of the other Party.⁶⁸ In addition the Czechoslovak Agent in a letter of October 22, 1933, to the Registrar, referring to Article 47 of the Rules [1931], announced his intention of filing certain new documents, and on October 25 filed all of them except one. Later most of the documents were read in the hearings before the Court. At the conclusion of his oral statement, the Hungarian Agent, invoking Article 52, asked the Court "to refuse to accept the documents in question, or alternatively to treat them, not as evidence, but as an integral part of the argument of the other side." In response to a question from the President, he refused to consent to their production as evidence. After hearing the Czechoslovak Agent, the Court decided on October 30, 1933:

"1. Not to refuse to accept such of these new documents as had already been produced by the Czechoslovak Agent.

"2. Not to invite the Hungarian Government to produce the original text or a certified true copy, together with a translation, of the documents in question.

"3. To refuse to accept the document of which the filing had been announced by the Czechoslovak Agent but which had not yet been produced by him."

⁶⁷ Series A/B, No. 53, pp. 25-26. For the discussion of this matter in the oral proceedings, see Series C, No. 66, pp. 2594, 2614-2627, 2916-2917; Series C, No. 67, pp. 3294, 3567-3568, 3674-3675.

In the Digest of Decisions taken by the Court in the Ninth Annual Report appears this statement:

"In connection with this incident, the rules which emerged from the Court's practice were stated: the first—which holds good equally as regards submissions and evidence—is that a submission can no longer be amended or new evidence produced by a Party at a moment when the other Party no longer has an opportunity of presenting observations upon the amended submission or the new evidence. The second rule is that, in the absence of a special decision, the time referred to by Art. 52 of the Statute coincides with the termination of the written proceedings; but if new documents are subsequently produced by a Party, the consent referred to in Art. 52 is presumed unless the other Party, has objected to the production of such documents." Series E, No. 9, p. 173.

"In the Pjazz, Csaky, Esterhazy case (April, 1936), the agent of one of the parties having referred in his speech to certain new documents, he was invited by the President to produce them. However, the agent of the other party objected. The former agent agreed that the documents in question should not be put in the record. In these circumstances, the Court took note of the standpoint adopted by the two parties and recorded that it was unnecessary that the documents in question should be added to the record of the case." Series E, No. 12, pp. 195-196.

⁶⁸ Series C, No. 73, pp. 773, 776.

The Court declared in its Judgment that this decision was based upon the following consideration:

"According to the Court's previous practice, if there is no special decision fixing the time limit contemplated by Article 52 of the Statute for the production of new documents, this time-limit has been regarded as expiring upon the termination of the written proceedings; if, after a case is ready for hearing, new documents are produced by one Party, the consent referred to in that Article has been presumed unless the other Party, after receiving copies of such documents, lodges an objection; but in the absence of that Party's consent, the Statute allows the Court to refuse to accept the documents in question but does not oblige it to do so.

"In these circumstances, it is desirable that, at the opening of the oral proceedings, the Court should know the views of the two Parties with regard to the intended production of new documents by one of them. For this reason, such an intention should, if possible, be expressed early enough to enable the other Party to intimate, before the hearings, whether it gives or withholds its consent.

"In this case, the Court applied these principles to the document the filing of which had been announced but had not been effected. The Court accepted the remaining documents in view of the circumstances in which they had been submitted, and which are peculiar to this case, subject to the usual reservation respecting the value it might decide to attach to them."⁶⁹

With respect to objection by the Hungarian Agent to certain other documents read by the Czechoslovak Agent in his oral reply, the Court accepted the statement of the latter that "he had produced no new document," none in fact having been filed with the Registry. The Court said that by denying that he had produced any new documents, "the Agent for the Czechoslovak Government doubtless meant to indicate that he did not intend the texts which he had cited to be regarded as evidence," and that as, consequently, it had "before it no new documents . . . it was not called upon to take a decision."⁷⁰

From this analysis of the treatment of evidence by the Permanent Court in its oral proceedings the following conclusions may fairly be drawn:

⁶⁹ Series A/B, No. 61, pp. 214-215. For discussion of the matter during the oral proceedings, see Series C, No. 73, pp. 767-778, 901-912, 1224-1225.

For further discussion of the submission of evidence during oral proceedings, see Series C, No. 18-I (*The Greco-Bulgarian Communities*), pp. 352-353; Series C, No. 52 (*Access to German Minority Schools in Upper Silesia*), pp. 108-109, 154-171.

⁷⁰ Series A/B, No. 61, p. 216. See also Series C, No. 56 (*Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*), pp. 284, 293, 300.

1. While the Court is liberal in the reception of evidence offered for the first time in the oral proceedings, it does not favor at this stage the introduction of evidence which was available for submission with the written pleadings. In only a few instances has it refused to accept evidence offered.
2. The Court has the power to refuse to accept evidence withheld in bad faith to a late stage of the proceedings.
3. Evidence will not be accepted unless there is opportunity for the other parties to comment upon it and, if necessary, to submit evidence in rebuttal. The Court has accordingly stated that an announcement should be made at the opening of the oral proceedings specifying any documents it is intended to produce.
4. Evidence has always been accepted where the consent of the other parties to its submission has been given. That consent is presumed in the absence of objection.
5. In the absence of consent, the Court may accept or refuse the evidence in the exercise of its discretion.
6. Whenever possible the Court avoids making a decision concerning the acceptance of evidence submitted for the first time during oral proceedings.

The Court has thus exhibited a commendable care to guard the discretion accorded to it by the Statute and the Rules concerning the admission of evidence during the oral proceedings. It would be unfortunate if its general practice of not admitting evidence at this stage, when objected to by the other party, developed into a fixed rule. On the other hand parties should not be encouraged to resort to such late introduction of evidence. The flexible procedure contemplated by the Statute which endows the Court with necessary authority to prevent the exclusion of needed light, but also to resist imposition upon it or the other party, should be jealously maintained.

Section 18. Later Submission: Extension of Time for Submission. Arbitral tribunals are, in general, liberal in the extension of time for the submission of evidence, including the taking of testimony of witnesses, unless the arbitral agreement prescribes time limits which may not be exceeded.

Under the broad authority conferred upon it by Article 43 of the Statute to fix the time within which the communication of the written pleadings with supporting documents shall be made, the Permanent Court of International Justice extends the time limits to suit the exigencies of the case.⁷¹ It may even decide "that a

⁷¹ The Convention establishing the Central American Court of Justice specifically conferred power upon the Court to extend the time for the submission of evidence. See Art. XVI, I *Anales* 2, 10; 2 Malloy's *Treaties* 2399, 2402-2403.

proceeding taken after the expiration of a time limit shall be considered as valid." ⁷² During the oral proceedings the Court may set a time limit for the production of further evidence." ⁷³

In arbitral agreements establishing *ad hoc* tribunals, in which the time limits for the filing of the pleadings, with accompanying documents, are prescribed, it is usually provided that such limits may be extended by mutual consent of the parties. There would seem to be no doubt that such an extension may be effected by agreement between the contracting parties, even in the absence of such a provision. However, in the absence of such agreement, a party submitting a pleading and accompanying evidence after the time fixed does so on peril of having it disregarded as the tribunal is without authority, in face of a mandatory compromise, to extend the time limits. If the arbitral agreement does not fix any time limits, the tribunal has authority to make such reasonable regulations in the matter as circumstances may require.

Agreements for the establishment of claims commissions customarily leave the fixing of time limits for the filing of pleadings and the submission of evidence to the discretion of the commission, providing only that the business of the commission be terminated on a fixed date.⁷⁴ Commissions operating under such agreements pursue a flexible practice with respect to the submission of evidence, and especially with reference to the taking of testimony.⁷⁵

⁷² 1936 Rules, Art. 37. See text, Appendix II.

"Time limits which have been fixed may be extended, and requests for extensions are usually granted if they would not unduly affect the readiness of a case for hearing at the opening of a session, or the possibility of dealing with it at a session which is in progress, and if an urgent case would not be delayed. An extension may be granted even if a party objects, or it may be subject to the consent of interested States; and it may be granted even though the time limits have been fixed on the basis of agreed proposals. It may also be granted for the purpose of enabling the parties to continue negotiations. If a preliminary objection is made, the extension of time limits for later proceedings in the case becomes necessary, and it is made *sine die*. An extension is now made by order of the Court, or of the President if the Court is not sitting.

"Some elasticity is provided for in that it may be decided in special circumstances that 'any proceeding taken after the expiration of a time limit shall be considered as valid.' On several occasions the Court has taken decisions in this sense; and such decisions may be made even after a refusal to extend the time limit. Such a decision need not be in the form of an order." Hudson, *Permanent Court*, p. 494.

⁷³ *Ibid.* 502. Also see discussion in sec. 17, *supra*.

⁷⁴ See, however, the provision in Art. 6, par. (m) of the Protocol of April 24, 1934, between the United States and Mexico, that "any pleading or brief which shall be filed more than thirty days after the due date for the filing thereof, shall be disregarded by the Commissioners and the Umpire, and that the respective case shall be considered by them upon the pleadings and briefs preceding the tardy pleadings and briefs, unless, by agreement of the two Governments, the continued pleading of the respective case shall be resumed." 4 *Treaties, Conventions, etc.* (1923-1937) 4489, 4493-4494.

⁷⁵ "11. When a claimant shall have filed his proofs in chief, the proof on the part of the Government of New Granada shall be filed within the term of ninety days. But upon good cause shown, on either side, the period pre-

It may be provided in the rules that the parties may by stipulation, confirmed by the commission, agree upon the submission of evidence after the time limits fixed.⁷⁶ Commissions have not hesitated, however, to refuse to receive evidence submitted after the time limits fixed, even where the rules specifically provided for an extension of time.⁷⁷

Section 19. The Same: After the Close of the Proceedings. It would seem as a matter of principle, that in the absence of specific prohibition in the arbitral agreement, arbitral tribunals should have power at any time before the entry of a decision in the case,

scribed may be extended in particular cases." Rules of Procedure, United States-New Granadian Mixed Claims Commission, Sept. 10, 1857, ms. *Journal of Proceedings* (1857) 10.

"5. Every claimant shall be allowed two months, after the filing of his memorial, to complete his proofs; and after the completion of his proofs, and notice thereof given, two months shall be allowed for taking proofs for the defense, with such further extension of time, in each case, as the commission, on application, may grant, for cause shown.

"After the proofs on the part of the defense shall have been closed, the commission will, when the claimant shall desire to take a rebutting proof, accord a reasonable time for the purpose." Rules of Procedure, United States-British Mixed Claims Commission of 1871, Hale's Report (1874) 178.

Judge Schoenrich stated in his Report of the Nicaraguan Mixed Claims Commission (1915) that the Commission in its rules "reserved to itself the right, in its discretion, to extend the time for presenting evidence, answers or briefs in particular cases," p. 24.

Upon the request of the Agent for James Hamilton, the United States-British Mixed Commission of 1822 permitted the claimant to sustain "by further testimony such points . . . as the Commissioners may not deem satisfactorily established." The American Commissioner declared it to be his opinion "that further proof ought to be allowed in all cases where it will promote substantial justice without the danger of fraud or unreasonable delay." The British Commissioner, though acquiescing, "not wishing to take parties by surprise," objected to the request "on general principles." Ms. *Journal of Proceedings* (1822), unpagcd, Wed., Jan. 26, 1825.

⁷⁶ United States-Mexican General Claims Commission, Sept. 8, 1923, Rules, Oct. 25, 1926, Art. IV (8), *Conventions and Rules, General and Special Claims Commissions* (Govt. Ptg. Office, 1925); Italian-Mexican Commission, Jan. 13, 1927, Rules, Dec. 6, 1930, Art. 18, *Reglas de procedimiento* (1931); Spanish-Mexican Commission, Nov. 25, 1925, Rules, Art. 20, *Reglas de procedimiento* (1927).

⁷⁷ *Delgado* case, No. 12 (United States v. Spain), Feb. 12, 1871, (Decision by Umpire, Apr. 22, 1876, overruling motion of United States asking leave to produce further evidence), *Record* (1871), vol. 11. Petitions concerning the submission of further testimony were frequently considered by the United States-French Mixed Claims Commission of 1881. See *Minutes of Proceedings*, pp. 167, 243, 245, 249, 297, 323, 412, 414-415, 477, 486. At the session of Oct. 21, 1882 the President of the Commission made the following statement in this respect: "The Commissioners have had under consideration the matter of the extension of time to take testimony. Heretofore the Commission has been liberal in affording both sides opportunities to complete their testimony; but the limitation put upon the continuance of this tribunal compels us to be hereafter very rigid in passing upon applications for further time to take testimony, and the Counsel for the Governments, and all other parties interested, must take notice hereafter no further extension of time will be allowed, except upon urgent reasons given, properly supported by official statements or affidavits." *Ibid.* 412. *Picasso* case (Italy v. Mexico), Jan. 13, 1927 (unpublished), cited in Feller, *Mexican Commissions*, p. 282.

to call upon the parties for the submission of any further evidence deemed necessary. Also, they should have the power to receive in their discretion evidence brought forward by the parties after the close of the proceedings, provided adequate cause be shown for not producing it earlier. In the Permanent Court of International Justice, when in pursuance of Article 54 of the Statute the President declares the proceedings closed, it is customary for him to reserve the right of the Court to ask for further explanations if deemed necessary. There would seem to be little doubt that the Court can subsequent to such declaration, and before the rendering of its decision, require the production of further evidence. The parties can present further evidence during such period, however, only subject to the discretion of the Court and with the consent of the other parties.⁷⁸ No situation appears to have arisen requiring the presentation of evidence to the Court under such circumstances. In the case concerning the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, the Court held that a copy of a decision of the Danzig High Court, sent to the Court subsequent to the closure of the hearings by an official of the Free City other than its Agent, "did not constitute fresh evidence, but merely a piece of information." It agreed "not to refuse to receive the document, but to treat it not as evidence but as a simple piece of information."⁷⁹

There is not sufficient uniformity in the practice of *ad hoc* tribunals in this matter to warrant drawing any general conclusions. As previously indicated it is only in rare instances that the arbitral agreement provides that certain specified evidence, and no other, shall be considered. In general, this would seem to leave tribunals with considerable discretion as to the point of time at which they will refuse to receive further evidence. In an opinion on the reception of evidence and claims in the Italian-Venezuelan Mixed Claims Commission of 1903, Umpire Ralston ruled "that additional evidence may be received by the Commissioners, if not by the Umpire, at any time before final decision."⁸⁰ On the other hand, the Domestic Claims Commission established under the act of July 13, 1832, to adjudicate the claims of American citizens against France adopted a rule that "no proof, argument or other document" should be received after the memorial filed by a claimant was set down for examination.⁸¹ In some instances evidence has been submitted and received by consent after the closure of

⁷⁸ Hudson, *Permanent Court*, pp. 509-510. See Series E, No. 3, p. 215.

⁷⁹ Series E, No. 12, p. 196.

⁸⁰ Ralston's Report (1904) 653. The Umpire declared that the power to do this was found in the provision of Art. III that "the Commissioners shall be bound before reaching a final decision to receive and carefully examine all evidence presented to them by the Royal Italian legation at Caracas and the Government of Venezuela. . . ."

⁸¹ 5 Moore's *Adjudications* 341.

the proceedings.⁸² The British-Mexican Claims Commission of 1926 considered that it did not have the authority under its Rules to hear new witnesses after the pleadings were closed, but stated that it had no objection to taking cognizance of a document containing a record of such evidence taken in accord with Mexican law. The case was accordingly reopened for that purpose.⁸³

The Umpires of the United States-Mexican Claims Commission of 1868 and the United States-Spanish Claims Commission of 1871 held that they had no authority to open cases for the filing of new evidence after they had been submitted to the Umpire by the Commissioners.⁸⁴

Section 20. Conclusions. Certain conclusions may be drawn from the foregoing exposition of the practice of tribunals with reference to the time of the presentation of evidence. The bulk of the documentary evidence is usually submitted with the pleading in which it is cited or which it supports. The testimony of witnesses must be taken before the tribunal within the time prescribed, or properly attested records of such evidence presented within the time limits fixed. Either oral or written evidence may generally be submitted later with the consent of the other parties, or with the sanction of the tribunal. Tribunals are generally liberal in permitting the production of evidence after time limits fixed and during the oral proceedings, but will not accept evidence at a stage too late to permit comment and answer by the opposing parties. In the final analysis, the rights of the parties with reference to the time of the production either of written or oral evidence must be determined with reference to the terms of the arbitral agreement.

Evidence withheld in bad faith for submission at a late stage to gain unfair advantage will not be admitted. Article 48 of the Rules of the Permanent Court, as previously pointed out, was intentionally made broad enough to give the Court power to prevent such action. However, as appears from the *Palmas Island* case widely different concepts may be held, in apparent good faith, as to the time at which evidence may properly be filed. The Arbitrator in that case saw no impropriety in the withholding by the Netherlands Government of a large part of its evidence until the presentation of pleadings called for by him in the exercise of his

⁸² *Cerruti* case (Italy v. Colombia), *Arbitration by the President of the United States*, under the Protocol of Aug. 18, 1894 (Washington, 1896) 1-5; *Bacigalupi* case (United States v. Chile), May 24, 1897, *Minutes of the Commission* (1901) 49-50.

⁸³ See *infra*, p. 296. See, however, the provision in Art. 31 of the Rules of this Commission that "the Commission may, after the filing of the last pleading and at any time prior to the award, order that the opinion of one or more experts be heard on matters requiring special knowledge, and it may likewise order views of premises." *Decisions and Opinions*, p. 14.

⁸⁴ For a discussion of the decisions of these Commissions on this point, see *infra*, pp. 292-297.

discretion. Such a procedure, while apparently open to the parties under the terms of the arbitral agreement, is subject to serious question upon the grounds of procedural efficiency. It need not unfairly prejudice the rights of the other party so long as he is allowed ample opportunity for rebuttal. Although flexibility in procedure is much to be desired and the intrusting of broad discretion to the tribunal is, in general, essential to the practicable conduct of international judicial proceedings, it is necessary to include safeguards in the arbitral agreement, and if not there in the rules of procedure, against undue delay in the submission of evidence. This is especially true in claims commissions. In the absence of appropriate limiting provisions in the arbitral agreement, there is nothing to prevent the parties from insisting on the admission of evidence at any time prior to the close of the proceedings.⁸⁵

The Permanent Court of International Justice has developed a flexible and effective set of rules with reference to the time at which evidence may properly be submitted, but one that depends to a considerable extent upon the good faith of the parties and the exercise of sound discretion by the Court. Sufficient provision is made for the late production of evidence not available at the time of the filing of the pleadings, or within other time limits fixed, or of evidence the importance of which to a full and fair elucidation of certain points only became apparent during the proceedings. Yet the parties are safeguarded from unfair surprise or from a dishonest use of the privilege of late filing of evidence by the right to refuse to consent to such filing, and by the power vested in the Court to refuse to sanction the production of evidence after the time limits fixed.

While in unusual circumstances it may be necessary to permit the introduction of evidence after the close of the hearings and the submission of the case to the tribunal, such action should be limited to cases in which it is manifestly impossible to reach a fair conclusion concerning controverted facts.

⁸⁵ Cf. especially secs. 14, 15, *supra*.

CHAPTER III

THE PRODUCTION OF EVIDENCE

THE RIGHTS OF THE PARTIES

Section 21. Communication of Evidence. It may be accepted as axiomatic that all pleadings and evidence produced by either party during the course of an arbitral proceeding must be communicated both to the tribunal and to the other parties. The only questions that require examination are the location of responsibility for such communication and the method by which it is accomplished. The problem is one largely peculiar to international proceedings as in municipal law the matter is taken care of by a fixed procedure and a permanent judicial organization.¹

In general arbitrations before *ad hoc* tribunals, responsibility for the communication of pleadings with accompanying documents is usually placed upon the parties. Communication must be made simultaneously to the tribunal and to the other party, and in the latter case is usually from agent to agent.² The arbitral agreement may provide that the requirement for communication to the other party may be satisfied by depositing the necessary copies with the legation or the foreign office of the other party.³ In proceedings before the Permanent Court of Arbitration at the Hague under Article 63 of the Hague Convention of 1907, agreement may be

¹ With reference to the matter of communication in French procedure, see Eugène Garsonnet and Charles J. Cézair-Bru, *Précis de procédure Civile*, Septieme edition, Paris, 1911, pp. 291-292.

² *Island of Bulama* case (Gt. Britain v. Portugal), Jan. 13, 1869, Art. III, 61 Br. and For. St. Paps. 1163; *Fur Seal Arbitration* (United States v. Gt. Britain), Feb. 29, 1892, Arts. III, IV, 1 Malloy's *Treaties* 747-748; *North Atlantic Coast Fisheries* case (United States v. Gt. Britain), Jan. 27, 1909, Art. VI, 1 Malloy's *Treaties* 838; *San Domingo Improvement Co.* case (United States v. Dominican Republic), Jan. 31, 1903, Art. III, 1 Malloy's *Treaties* 415; *British Guiana-Brazilian Boundary* case, Nov. 6, 1901, Art. V, 94 Br. and For. St. Paps. 25; *Muscat Dhows* case (France v. Gt. Britain), Oct. 13, 1904, Art. II, 98 Br. and For. St. Paps. 46; *Chevreau* case (France v. Gt. Britain), March 4, 1930, Art. IV, *Compromis Protocoles des Séances*, etc. (The Hague [decision June 9, 1931]) 3.

³ *Chamizal* case (United States v. Mexico), June 24, 1910, Art. V, 3 *Treaties, Conventions*, etc. (Redmond, 1923) 2730; *Norwegian Claims* case (United States v. Norway), June 30, 1921, Art. II, 3 *Treaties, Conventions*, etc. (Redmond, 1923) 2750; *Salem Claim* (United States v. Egypt), Jan. 20, 1931, Art. 4, Ex. Agreement Series, No. 33.

made to communicate all documents through the International Bureau. Resort has been had to this means of communication in at least seven of the proceedings conducted under this Convention. Documents communicated after the time limits fixed in the agreement or rules of procedure will not be considered unless communicated to the other parties, but the acceptance of documents so communicated is usually subject to the discretion of the tribunal.⁴

As claims commissions usually have to handle a large number of cases, involving numerous pleadings and large quantities of documentary evidence, it is customary for them to establish a joint secretariat with which all documents are filed. The secretariat assumes responsibility for transmitting the documents to the other parties.

Proceedings in the Permanent Court of International Justice, with its permanent and efficiently organized Registry, more nearly approach those in municipal courts in this respect. Under Article 43 of the Statute, all communications must "be made through the Registrar, in the order and within the time fixed by the Court," and a "certified copy of every document produced by one party shall be communicated to the other party."⁵ The Rules provide in Article 44 that "the Registrar shall forward to the judges and to the parties copies of all the documents in the case, as and when he receives them."⁶ Certified true copies of documents produced

⁴ *British Guiana-Venezuela Boundary Arbitration*, Feb. 2, 1897, Rules of Procedure, June 14, 1899, Art. 8, 92 Br. and For. St. Paps. 467; *The David J. Adams* case (United States v. Gt. Britain), Aug. 18, 1910, Claim No. 18, "Shorthand Notes of Proceedings," pp. 70-71, *Pleadings and Awards* (1910), vol. 10; *Pelletier* case (United States v. Haiti), May 24, 1884, *Pelletier Claim* (1885), vol. I, p. 726; *Venezuela Preferential* case (Germany, Gt. Britain and Italy v. Venezuela), May 7, 1903, *Recueil des Actes et Protocoles* (The Hague, 1904) 42, 52, *Proceedings* (1905) 62, 81; *The Norwegian Claims* case (United States v. Norway), June 30, 1921, *Proceedings* (1922) 13.

⁵ The latter rule was derived from Art. 64 of the Hague Convention of 1907. Baron Descamps said of the corresponding provision (Art. 40) of the Convention of 1907 that it was regarded by the Third Commission as "a guaranty of prime importance." *Hague Conference Reports*, p. 80. For discussion of the provision in Art. 63 for fixing the time limits for the communication of documents, see *ibid.* 344-345.

⁶ Cf. Art. XIV of the Convention for the Establishment of a Central American Court of Justice, Appendix V, and Art. 50 of the Court's Ordinance of Procedure, Appendix VI.

However, Art. 48 of the Rules of the Permanent Court of International Justice provides with respect to documents submitted after the termination of the written proceedings, that the Registry "will inform the Court" of the filing of such documents. See discussion of this provision in sec. 17, *supra*.

Prior to 1936, Art. 47 of the Rules apparently contemplated direct communication between the parties concerning notice of evidence to be produced during the oral proceedings. Art. 49 of the 1936 Rules was modified to require that the other parties be informed "through the Registry." In criticising the old rule in his Report of June, 1933, the Registrar said that the Parties had "only exceptionally . . . communicated beforehand a list of documents which they intended to produce at the hearings," and that the Court had "never asked for the production of such a list." Series D, No. 2 (3d add.), p. 825.

or referred to during the oral proceedings, and not previously communicated, must be handed to the Registrar, who communicates them to the agent of the other party so that he may comment upon them if he so desires.⁷ During the proceedings in the *Wimbledon* case, the Court decided that it could "only make official use of certain documents on condition of their being communicated to the Parties."⁸

The Court's system of communication through the Registry appears to have proved very satisfactory in operation. It has the great merit of enabling the Court to keep full control of the communication of all documents. It also gives regularity and permanence to the proceedings, and makes it possible to keep a full record of all acts and documents. The records of proceedings before *ad hoc* tribunals have not infrequently suffered greatly from the haphazard method of communication employed.

Section 22. Inspection and Discovery of Documents.⁹ A corollary of the right of parties to have copies of all documents produced communicated to them is that if, for any reason, documents are cited or referred to by a party without being produced, they shall have a right to the inspection or discovery of such documents.¹⁰ In theory the necessity for the exercise of such a right cannot arise, as the obligation to submit with the pleadings all documents in support is almost always included in arbitral agreements, or in the rules of procedure, with the accompanying rule that copies of all documents be communicated to the parties. In actual practice, documents are at times referred to or even relied on without being submitted.

In the event of such failure or omission to produce a relevant document which is in the possession of the party, the other party is generally entitled either to be given an opportunity to inspect it, or to require that the original or a certified copy thereof be produced. In some cases request may be made for permission to inspect the original of which a copy has been produced. The right of inspection may also be extended by agreement to include the

⁷ Series E, No. 6, p. 292; Series C, No. 16-III, pp. 14-15.

⁸ Series E, No. 1, p. 268. During the proceedings in the case of *The Free Zones of Upper Savoy and the District of Gex*, Professor Basdevant objected to the irregular procedure of the Swiss Agent in depositing at the Library of the Peace Palace a volume to which he had referred, instead of filing it with the Registry. Series C, No. 17-I, pp. 368-369. See also Series C, No. 55, pp. 211-212.

⁹ For discussion of the right of "discovery" of facts peculiarly within the knowledge of one of the parties, see *infra*, sec. 83.

¹⁰ See *infra*, p. 84, for discussion of the *Parker* case before the United States-Mexican Mixed Claims Commission of 1923, and also sec. 31. Cf. following statement by Colin and Capitant: "Les moyens de preuve allégués par une partie doivent toujours être connus de l'adversaire, de manière qu'il soit à même de les discuter et d'y contredire." *Cours élémentaire de droit civil français*. Paris, 1931, 3 vols., vol. II, p. 411.

originals of documents or proof which a party wishes to present in support of its pleadings, and which are in the archives or public offices of the other Government and cannot be conveniently withdrawn.¹¹ There is no such provision in the Statute or Rules of the Permanent Court of International Justice, the rule being strictly enforced which requires the production of all documents in support of the pleadings, and of all cited or relied on in the course of the oral pleadings. Nor is there any provision for a right of discovery, but the Court may, and does require the production of the originals or duly certified copies of all documents cited or relied upon. When a document is filed that could not be copied, it is placed in a room by the Registrar where it is accessible to the members of the Court and to the Agents of the parties.¹²

The right of discovery is generally limited to documents which have been referred to or relied upon in the pleadings of the other party without being produced and which are in the exclusive possession of that party. If requested the party must in such a case communicate to the tribunal and to the other party the original or a certified copy of the document.¹³ There is, in addition, of course, the general right to call upon the party through the tribunal for

¹¹ *Orinoco Steamship Co. case* (United States v. Venezuela), Feb. 13, 1909, Art. VIII, 2 Malloy's *Treaties* 1886; *International Joint Commission*, United States and Canada, Jan. 11, 1909, Rules of Procedure, Promulgated Feb. 2, 1912, Art. 16, *Rules of Procedure of the International Joint Commission* (Washington, 1912) 7; *Chamizal case* (United States v. Mexico), June 24, 1910, *Correspondence relating to the inspection of documents printed or relied on in the Mexican case and countercase*. Letters, William Cullen Dennis and Señor Pereyra from April 15, 1911, to April 26, 1911 (printed Copy, Dept. of State Library); United States-Mexican General Claims Commission, Protocol of April 24, 1934, Art. 6 (p), 4 *Treaties, Conventions, etc.* (1923-1937) 4489, 4494; Spanish-Mexican Claims Commission Nov. 25, 1925, Rules, Arts. 29-32, *Reglas de procedimiento* (1927) 10; British-Mexican Claims Commission, Nov. 19, 1926, Rules, Arts. 24-26, *Decisions and Opinions*, p. 13; *Yukon Lumber Co. case*, Claim No. 5 (United States v. Gt. Britain), Aug. 18, 1910, Answer of the United States (Date of filing, April 16, 1913) 3-4, *Pleadings and Awards* (1910), vol. 1.

With reference to a motion by Great Britain in the Fur Seal Arbitration for an order requiring the production of a report in the hands of the Government of the United States, the United States contended that one party could not by referring to a document in the exclusive possession of the other compel that party to produce it. It asserted its willingness, however, to produce the document in question [an official report on seal fisheries in the Pribiloff Islands], to be used as evidence by either party, the Tribunal to be left with discretion as to the weight to be attributed to it. The Tribunal accordingly directed that the document be regarded as before it "to be made such use of as the Tribunal shall see fit." *Proceedings* (1895), vol. 11, pp. 15-24.

¹² Series D, No. 2 (3d add.), p. 848.

¹³ *Island of Bulama case* (Gt. Britain v. Portugal), Jan. 13, 1869, Art. IV, 61 Br. and For. St. Paps. 1164; *The Halifax Commission* (United States v. Gt. Britain), May 8, 1871, Art. XXIV, 1 Malloy's *Treaties* 710; *Alaskan Boundary Arbitration* (United States v. Gt. Britain), Jan. 24, 1903, Art. II, 1 Malloy's *Treaties* 789; *Japanese House Tax case* (France, Germany and Gt. Britain v. Japan), Aug. 28, 1902, Art. 4, *Recueil des Actes et Protocoles*, etc. (The Hague, 1905) 14; *Russian Indemnity case* (Russia v. Turkey), July

the production of such documents even when not in the exclusive possession of the party. The right of discovery has, in some instances, been extended to include "any fact or any document deemed to be or to contain material evidence for the party asking it; the document desired to be described with sufficient accuracy for identification, and the demanded discovery to be made by delivering a statement of the fact or by depositing a copy of such document."¹⁴ Something in the nature of discovery is the right sometimes accorded in the arbitral agreement, either directly to the tribunal or to the representatives of the parties, to be exercised through the tribunal to call upon the Governments concerned to produce all relevant documents contained in their archives.¹⁵

22/Aug. 4, 1910, Art. 7, *Protocoles des Séances et Sentence* (The Hague, 1912) 9.

"Mr. Cohen requested the Tribunal to enact the following rule which had been laid down in many former Arbitrations:

"If in the Cases or Countercases submitted to the Arbitrators any Party shall have specified or alluded to any report or document in its own exclusive possession without annexing a copy such Party shall be bound, if any other Party thinks proper to apply for it, to furnish that Party with a copy thereof, and any Party may call upon any other Party through the Bureau to produce the originals or certified copies of any papers adduced as evidence and such originals or certified copies shall be thereupon produced as soon as is reasonably possible.

"The President said that the Tribunal had no objection to Mr. Cohen's request provided that the production of such documents should cause no delay in the oral discussion." *Venezuela Preferential* case (Germany, Gt. Britain, and Italy v. Venezuela et al.), May 7, 1903, *Recueil des Actes et Protocoles*, etc. (The Hague, 1904) 59.

¹⁴ *Pious Fund* case (United States v. Mexico), May 22, 1902, Art. IV, 1 Malloy's *Treaties* 1196. See substantially similar provision in *Landreau Claim* (United States v. Peru), May 21, 1921, Art. IX, 3 *Treaties, Conventions*, etc. (Redmond, 1923) 2797, 2799. A broad rule of this character was adopted by some of the Mixed Arbitral Tribunals, with the proviso that the means to be used to secure the discovery requested should be subject to the discretion of the Tribunal. For example, see Arts. 24 (c), 25, of the Rules of the Anglo-German Tribunal. 1 *Recueil des décisions* 115.

¹⁵ United States and Mexico, Treaty of Feb. 2, 1848, Art. XV, 1 Malloy's *Treaties* 1114; United States-Peruvian Mixed Claims Commission, Jan. 12, 1863, Art. IV, 2 Malloy's *Treaties* 1409; Order of Aug. 6, 1863, requesting Peruvian Minister of Foreign Relations to furnish to the Commission "the documents in the case of the Whale Ship 'William Lee,'" ms. *Proceedings* (1863) 24; *Salvador Commercial Co.* case (United States v. Salvador), Dec. 19, 1901, Art. III, 2 Malloy's *Treaties* 1569.

Art. III of the Convention of July 12, 1822, provided: "And His Britannic Majesty hereby engages to cause to be produced before the commission, as material towards ascertaining facts, all the evidence of which His Majesty's Government may be in possession, by returns from His Majesty's officers or otherwise, of the number of slaves carried away."

Early in the proceedings of the Mixed Commission one of the attorneys for claimants having asked that the evidence referred to in this provision be produced, the Commission answered that the evidence was not in its possession or power. Subsequently the British Commissioner received a large mass of papers from his Government relating to the claims but refused to deliver them to the Commission except on condition that claimants be denied inspection of them until the testimony in their cases had been closed. The American Commissioner took a contrary view, but the question was never settled as the Commissioners were unable to agree on other points, and the Commission was ultimately dissolved by Art. V of the new Convention of Nov. 13, 1826. I Moore's *Arbitrations* 374-382.

In the light of the practice thus described, it may fairly be inferred that, in the absence of a specific provision to the contrary in the arbitral agreement, international tribunals have the authority to enforce the right of inspection and of discovery to the extent necessary to ensure an opportunity to the parties to examine all documents cited or relied upon during the proceedings.

Section 23. Portions or Extracts of Documents. A very difficult question is that presented by the production of portions or extracts of documents, without making readily available the full text. There is no objection to the extract itself so long as it represents a thought or fact complete in itself and not dependent upon the context from which it is taken. As was suggested in the discussion in the Permanent Court of International Justice concerning the obligation to present documents in support, quoted in section 15,¹⁶ it hardly seems necessary to produce the whole of a long document consisting of separable portions, such as a code of laws, a long statute, or treaty. Controversy has usually arisen over the production of extracts from documents not so readily separable.

One proposition that can be stated with certainty is that when an extract is produced it should be clearly designated as such, and if necessary to making clear the completeness of the part quoted, the substance of the omitted material indicated. Thus it appears that the United States was fully warranted in objecting in the *Shufeldt* case to Guatemala's introducing what purported to be a complete copy of a report of the Ministry of Agriculture to the Guatemalan Assembly on March 15, 1922, whereas in fact certain annexes accompanying the report were omitted, in which the concession contract forming the basis of the claim was discussed. The omission, the United States declared, was most serious because a great part of the argument of Guatemala's representative was "based upon the assumption that the contract was not reported to the Assembly by the Minister of Agriculture."¹⁷ Such an omission illustrates graphically the danger inherent in permitting the use of anything less than the full text of a document.

Objection has not infrequently been made to parts of documents produced on the ground either that they did not fairly represent the meaning of the whole, or that it was impossible to determine from reading the part whether it was complete. During the oral argument in the *British-Guiana-Venezuelan Boundary Arbitration*, Sir Richard Webster declared that the whole of a certain document did not bear out the meaning conveyed by the extract printed in the appendix to the Venezuelan case. General Harrison countered that such an objection should have been made in the counter case, but the President said the Tribunal agreed that the

¹⁶ See note 33, p. 49.

¹⁷ *Shufeldt Claim* (1932) 751-753.

whole document should be put in. Later when British counsel proposed to read the whole of a document of which only a part had been produced in the printed pleadings, Lord Russell, one of the arbitrators, said that if there was no doubt of the extract "being part of a genuine document . . . the Court ought to see it." Justice Brewer agreed that "the whole document" should be put forward, and the President concluded that it was "quite impossible for the Tribunal to judge about documents which have not been submitted to it."¹⁸

In the *Tacna-Arica Boundary Arbitration* under the Protocol of July 20, 1922, Chile objected in its counter case to the use by Peru of "quotations, statements of fact and opinions without citation or definite reference to the documents or publications from which they have been taken." In the absence of adequate documentation, Chile pointed out, "the accuracy of quotations and their relations to the context would depend entirely on the good faith and sense of obligation of the party relying on such quotations." Reference to sources should be given in every instance, Chile contended, "so that the other party as well as the arbitrator may have full opportunity to examine such evidence."¹⁹ This appears to be a sound contention.

A matter closely related to the production of extracts or parts of documents is that of the effect of the use of garbled or inaccurate documentary evidence. Such evidence will not be excluded solely on the ground that the copies produced before the tribunal

¹⁸ *Proceedings* (1899), vols. II, pp. 348-354, IV, pp. 1019-1020. In the oral hearings before the Permanent Court of International Justice in the case concerning *Access to Anchorage in the Port of Danzig of Polish War Vessels*, Sir John Fisher Williams requested the production by Poland of the full text of a letter, and of a Danzig memorandum of 1927 of which only summaries had been given in the pleadings. Series C, No. 55, pp. 293, 305.

The Commission in the *Chamizal* case (United States v. Mexico), June 24, 1910, declared that it could not accept an extract from an instruction by Secretary of State Clay, merely printed in Wharton's Digest of International Law, but that the document would have to be made a part of the proceedings in its entirety. *Memoria documentada del juicio de arbitraje del Chamizal* (Mexico, 1911), vol. I, pp. 884-886.

In his award in the *Costa Rica-Panama Boundary Arbitration*, dated Sept. 12, 1914, Chief Justice White overruled "without further statement on the subject," on the ground that it had been "found irrelevant to the determination of the case," a motion to "eliminate certain papers because they are said to be partial and hence unauthorized." 108 Br. and For. St. Paps. 439.

¹⁹ *Counter-Case of the Republic of Chile*, pp. 6-7. In its *Counter-Case* in the *Alaskan Boundary Arbitration*, Great Britain asserted that even where documents were "printed in full and in the language of the original, the elementary principles of justice require that the party against whom they are used should, before dealing with them have the opportunity of seeing the original." She added that "where . . . as is frequently the case in the United States Appendix, all that appears is . . . extracts only from documents not accessible to both parties, the case is much stronger." Right was reserved "to full inspection and to an opportunity for challenging, in case of any document the original of which is not accessible to her, either the correctness of the copy printed, the accuracy of any translation or the completeness of any extract." *Proceedings* (1904), vol. 4, p. 66.

are not accurate reproductions of the originals. If it be shown that the omissions or inaccuracies have been intentionally introduced into the documents for the purpose of deceiving the tribunal, they may be rejected as fraudulent. It seems clear, however, that the tribunal may consider such documentary evidence vitiated entirely by its inaccuracies and omissions. The question was considered at some length by Commissioner Nielsen in his concurring opinion in the *Mallen* case before the United States-Mexican General Claims Commission of 1923. In that case the Agent for the United States had argued that the case should be dismissed on the alleged ground that the claimant had sought to mislead his Government and the Government of the United States by introducing unreliable testimony. Commissioner Nielsen agreed that "the unreliable character of testimony . . . should be taken account of in connection with the assessment of damages," but he denied that this fact alone warranted a dismissal of the claim, saying:

"Neither the fact that Mr. Mallen violated the law of Texas nor the fact that he has furnished inaccurate or exaggerated statements can in any way affect the right of the Mexican Government to present against the United States a claim grounded on an assertion of responsibility under rules of international law, although obviously these matters are pertinent with respect to a determination of the merits of the claim, because account must properly be taken of them in reaching a conclusion regarding the nature and extent of the wrongs inflicted on Mr. Mallen."²⁰

Mr. Nielsen added, however, that the Commission had not been misled by any inaccurate evidence, there being substantial evidence in the record that Mallen had suffered a grave injury, and of "an absence of prompt and effective processes of law to bring about the punishment of a wrongdoer" and also "of condonement by officers of the law of the injury inflicted. . . ."²¹

²⁰ *Opinions* (1927) 264, 272-273. In support of this conclusion Mr. Nielsen cited certain passages concerning the procedure in the *Rio Grande* case, and the *Cayuga Indians* case before the United States British Mixed Claims Commission of 1910. Nielsen's Report (1926) 335, 300, 303, 304.

Umpire Thornton dismissed the claim in the *Sustindall and Co.* case before the United States Mexican Mixed Claims Commission of 1868, apparently on the ground of inaccuracy in the date in the naturalization certificate of the claimant. VI ms. *Opinions* 505-506. See also *Hoachoozo Palestine Land and Development Co.* case, Turkish Claims Settlement, Nielsen's Report (1937) 254, 262.

In its Contre-Mémoire in the *Muscat Dhows* case, the French Government made the rather serious charge with reference to the translation of a proclamation of the Sultan of Mascate submitted by Great Britain, that the divergence between the English version and the French version did not result from a "more or less inexact translation." The point was not mentioned in the award. *Boutres mascatais francisés, Contre-mémoire présenté par le gouvernement de la République Française*, etc., Paris, 1905, p. 10.

²¹ *Opinions* (1927) 274.

The Permanent Court of International Justice in one instance "in view of the importance of strict accuracy in the text of documents filed with the Court . . . decided . . . to draw the attention of the Agents to certain inaccuracies in documents which had been submitted to it."²²

Certain conclusions are warranted by the practice revealed in these cases. Where necessity requires because of the length or volume of the document in question, there is no objection to the production of an extract if that fact is clearly indicated, and the nature of the omitted portions indicated.²³ It is fundamental that the source of all documents or quotations adduced should be given whether complete or partial. If an extract of a document has been introduced, the party using it must be prepared to lay the full text of it before the tribunal, or to communicate it to the other party, or to have it immediately available for inspection. The rule adopted by the United States-Mexican General Claims Commission on this matter represents a sound practice:

"As to documents and other proof filed in support of or in opposition to claims, and in connection with pleadings herein provided for, only such portions thereof as shall be relied upon need be copies, with such explanatory note as may enable the Commission or Counsel to understand the same: *Provided*, however, that on the request of the opposing Agent the complete document or a certified copy thereof shall be made available in the office of the Commission."²⁴

Another practical solution of the problem so far as printed official publications are concerned, may be found in the rule adopted by some commissions. The rule provides that use may be made in the pleadings of public documents printed or published under the authority of the Government of either party, without being copied into the record. This is subject to the provisos that the

²² Series E, No. 8, p. 261. For a lengthy exchange of views between the Danish and Norwegian Agents during the proceedings in the case concerning the *Legal Status of Eastern Greenland* with reference to the allegations by the latter that Denmark had submitted with her case a number of quotations from old legal sources that were incomplete and therefore misleading, see Series C, No. 63, pp. 992-995, 1003; No. 67, pp. 3291-3294, 3556-3558.

²³ "It would seem that the general tendency is to require the whole of a single document to be put in and treated as the evidence of the party desiring to offer a part only, even though the actual reading be postponed. But the rulings are not harmonious, nor always definite. The matter should be left entirely to the discretion of the trial Court." IV Wigmore's *Evidence* 488. See also *ibid.* 502.

It may be noted that the Rules of the Permanent Court of International Justice specifically contemplate the use of parts of documents only in the case of lengthy documents. See Art. 43, Appendix II.

²⁴ Rules as amended Oct. 25, 1926, Art. V (2), Mimeographed copy, Dept. of State, Feller, *Mexican Commissions*, p. 377. Art. V (3) of the Rules of the United States-Mexican Special Claims Commission of 1923 was amended on Jan. 24, 1925, to make it identical with this provision. *Ibid.* 406.

portion relied upon is properly identified in the pleadings or briefs, and that copies are filed with the commission or held in readiness to be furnished, on request, to the commission or to the other party.²⁵

It is permissible, therefore, under existing practice, to submit portions or extracts of lengthy documents where the interests of brevity and expediency can be served without sacrificing clarity and fidelity in the disclosure of the evidence relied upon. Where such portions or extracts are submitted, they must be clearly identified as incomplete, and the full document or publication from which they are taken filed with the tribunal, or held in readiness for inspection by the tribunal or by the opposing party. The procedure is especially useful in submitting quotations or extracts from public documents or standard publications which are readily available for examination, such as statutes, codes of laws, treaties, etc.

Section 24. Awards Based Upon Evidence Produced. It is an established principle of modern judicial procedure that judgments

²⁵ United States-British Claims Commission, Aug. 18, 1910, Rules, Art. 21, Nielsen's Report (1926) 13; United States-Panamanian General Claims Commission, July 28, 1926, Rules, Art. 27, Hunt's Report (1932) 849.

In its counter-case in the *Norwegian Claims Arbitration*, June 30, 1921, the United States referred to the fact that Norway had quoted in her case "extracts from numerous documents and published works" without setting forth the full text in her Documentary Evidence, and said:

"No objection is perceived to this practice, which seems in the interest of simplicity and economy, so long as it is confined to public documents and published works which are readily accessible to both parties; but the United States desires expressly to reserve the right to use in the written and oral Arguments any portion of any documents or of the record of any committee hearings or judicial proceedings from which quotation has been made in the Norwegian Case or Counter-case, without publishing the entire document or record in the Counter-case of the United States.

"As stated in the Case of the United States, certified copies of all documentary evidence printed in the Counter-case of the United States, duly authenticated, will be produced at the trial, in accordance with article 64 of the Hague Convention for the Pacific Settlement of International Disputes." *Counter Case of United States* (Washington, 1922) 2.

"In the case concerning certain German interests in Polish Upper Silesia (merits), the German Agent having asked for the production of the whole of certain works and documents, extracts from which were included in the Respondent Government's Counter-Case and which were unknown to him, the Registrar approached the Respondent's Agent and other authorities with a view to obtaining them. In the case of one document, the authority approached (The Conference of Ambassadors) having been unable to find therein anything relevant to the point at issue which it could communicate, the Respondent's Agent withdrew the exhibit in question during the hearing (February 20th, 1926), and the Court duly noted the fact." Series E, No. 6, pp. 290-291.

"Sixth. . . .

"(o) The complete original of any document filed, either in whole or in part, shall be retained in the Agency filing the document and shall be made available for inspection by any authorized representative of the Agent of either side." United States and Mexico, Protocol of April 24, 1934, 4 *Treaties, Conventions*, etc. (1923-1937) 4494.

can only be based upon allegations fully proved by competent evidence produced before the Court or admitted by the parties. There may be a difference of view as between different systems of law as to the proper allocation of the burden for obtaining and producing the necessary evidence, but there is no disagreement as to the ultimate obligation resting upon the court to dismiss a contention not properly supported by evidence, unless it has been admitted by the opposing party.²⁶

As previously pointed out, international tribunals are quite liberal in the enforcement of rules concerning admission and evaluation of evidence,²⁷ and as will be shown hereinafter, they are inclined to go rather far in securing on their own initiative evidence to make up deficiencies in that voluntarily produced by the parties.²⁸ Nevertheless, in making awards, they generally follow a practice closely analogous to the rule of law just stated. In general arbitrations the specific character of the questions usually submitted to international tribunals and their narrowly circumscribed jurisdiction as a rule serve to make them especially sensitive to the necessity of limiting their awards to the premises established by the evidence produced, and by that of which they may be entitled to take judicial notice. While claims commissions are necessarily more liberal because of the difficulties surrounding the obtaining of evidence for the numerous and multifarious questions with which they have to deal, they generally refuse to go outside the evidence before them to find a basis for an award. For example, in refusing to allow indemnity in the case of *Jessie Taft Smith* and *John W. Smith*, the United States-German Mixed Claims Commission of 1922 declared:

"The record in this case is typical of numerous records pending before this Commission in which the American Agent has met with small success in his diligent efforts to induce the claimant's counsel to furnish competent and satisfactory evidence in support of their claims. The rules of this Commission with respect to the form and nature of evidence which may be presented are most liberal, but these rules do not go so far as to waive the burden resting upon a claimant to prove his case."²⁹

The rule as generally applied by international tribunals is well stated by Judge Huber in his opinion in the *Palmas Island* case.

²⁶ V Wigmore's *Evidence* 434-435; Colin and Capitant, *op. cit.*, vol. II, p. 411; Art. 286 of the German Code of Civil Procedure (1933). For text, see note 23, p. 11. Cf. *infra*, sec. 93.

²⁷ See *supra*, secs. 3, 4.

²⁸ See *infra*, sec. 32.

²⁹ *Administrative Decisions and Opinions*, etc. (1925) 470.

Another fact bearing out the conclusion stated is the detailed character of the rules usually adopted by such commissions as to the facts which must be adduced and proved by claimants in order to establish a right to recover an indemnity.

After reviewing the difficulties confronting the United States in obtaining satisfactory evidence of the exercise of jurisdiction by Spain on the Island of Palmas or Miangas, a point which was decisive in the determination of the question of sovereignty over the island, Judge Huber declared:

"The Arbitrator has no possibility of taking into account this situation; he can found his award only on the facts alleged and proved by the Parties, and he is bound to consider all proved facts which are pertinent in his opinion."³⁰

In determining whether there is sufficient evidence upon which to base an award, account may be taken of the evidence submitted by all parties to the proceedings.³¹

In some instances arbitrators have considered themselves bound to reach a decision upon the basis of the "evidence produced, notwithstanding any errors, omissions, or misstatements which may possibly have been made by one party or the other," and "not to supply any deficiencies in the proofs submitted by the parties."³² As will be seen, this view of the limited authority of the tribunal to require the production of further evidence, so far as it may be available, is not generally accepted. However, if a party does not voluntarily produce readily available evidence,³³ a tribunal may consider itself warranted in proceeding to judgment upon the basis of *prima facie* evidence produced by the other party.³⁴

³⁰ *Arbitral Award* (The Hague, 1928) 34-36. Accord: United States-British Mixed Commission, June 30, 1822, Opinion of British Commissioner concerning the case of *John Cowper*, ms. *Journal of Proceedings* (1822) (unpaged), March 16, 1825, Reply of British Commissioner to argument of American Commissioner; *Green* case, Board of Commissioners, Act of March 3, 1849, ms. *Opinions*, 1849, vol. II, pp. 770, 778-779; *Schooner Felix* case, *ibid.*, vol. I, pp. 84, 119-120; *Tacna-Arica Boundary Arbitration* (Peru v. Chile), July 20, 1922, *Counter-Case of the Republic of Chile*, pp. 6-7; *May* case (United States v. Guatemala), Feb. 23, 1900, 1900 For. Rel. 656, 661 (Award of Arbitrator). Cf. the discussion of the effect of assertions by a sovereign state concerning its own acts with special reference to the *Palmas Island* case, *infra*, sec. 93. See also Rule 3 of the Rules of Procedure of Aug. 1, 1803, adopted by the Board of Commissioners appointed under the Convention of April 30, 1803, to distribute the French Indemnity. 5 Moore's *Adjudications* 219.

"In conclusion Great Britain desires once more most respectfully to insist that this case must be determined 'in accordance with the evidence before the arbitrators and with that alone.'" British Guiana-Brazilian Boundary Arbitration, *Argument on behalf of His Britannic Majesty* (London, 1904) 129.

³¹ *Archuleta* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1928-1929) 73, 76; *Chevreau* case (France v. Gt. Britain), March 4, 1930, *Sentence arbitrale*, June 9, 1931, in *Compromis, Protocoles des Séances et Sentence*, etc. (The Hague, 1931) 50-51. See Manley O. Hudson, "The Chevreau Claim," 26 A.J.I.L. 805 (1932).

³² *Whale Ship "Canada"* case (Brazil v. United States), March 14, 1870, II Moore's *Arbitrations* 1742-1744; *Central Agency (Ltd.) Glasgow* case (Gt. Britain v. Mexico), Nov. 19, 1926, Dissenting Opinion of Commissioner (Mexican) Flores, *Decisions and Opinions*, pp. 72-73.

³³ See *infra*, sec. 31.

³⁴ See *infra*, sec. 35.

Section 25. Use of Evidence Produced in Other Cases. In the absence of specific provision in the arbitral agreement or the rules of procedure, there can be no right upon the part of one party to cite or rely upon evidence produced before the same tribunal in a separate case, without submitting such evidence in regular form and according to the rules established by the tribunal in the course of the pleadings and arguments in his own case. In the interest of economy, both of time and money and because of the difficulty of obtaining proper evidence, and of the interrelation of the instances upon which claims were based, the rules of a number of domestic boards or commissions established by act of the Congress of the United States have accorded to parties the right to use evidence filed in other cases. Such use has been made subject to the provisos that due notice be given of intent to use it, and that the evidence to be used be described with particularity.³⁵ In a few cases, mixed commissions have adopted a similar rule with respect to evidence presented in cases before them.³⁶ The Act of January 20, 1885, conferring upon the Court of Claims jurisdiction to "examine and determine the validity and the amount" of the French Spoliation Claims, provided in section 5 that all claimants and the United States might use before the Court any of certain evidence from abroad which the Secretary of State was required to obtain "through the American minister at Paris or otherwise," and relevant evidence and documents on file in the Department of State.³⁷

³⁵ Spanish Inscription (Convention of Feb. 17, 1834), Act of June 7, 1836, *Final Report of the Commissioner*, Jan. 31, 1838 ("... Proofs ... were always collated with each other, as well as with any evidence that was furnished from the Department of State"), V Moore's *Arbitrations* 4533, 4545; Danish Indemnity (Convention of March 28, 1830), Act of Feb. 25, 1831, *Rules of Procedure* ("... that the several claimants ... be permitted ... to examine the memorials and documents in the several cases before this board, and to file objections accompanied by arguments"), *ibid.* 4549, 4566; French Indemnity (Convention of July 4, 1831), Act of July 13, 1832, *Notes of Commissioner Kane* ("... for every purpose the evidence filed by the claimants was compared with that received through the department of state from the government of France. So too, the evidence filed by one claimant was always collated with that filed by other claimants for injuries received from the same spoliation"), 5 Moore's *Adjudications* 307, 405; (Second) Court of Commissioners of Alabama Claims, Act of June 5, 1882, *Rules of Procedure*, Art. XII, ms. *Journal of Proceedings* (1883), vol. I, pp. 6, 10; *Rules of Court of Commissioners* (Washington, 1882) 8; Spanish Treaty Claims Commission, Act of March 2, 1901, *Opinion No. 31*, Dec. 24, 1904 (addition to Rule No. 20), Printed circular, National Archives of United States.

³⁶ United States-British Mixed Commission, June 30, 1822, Rule adopted Dec. 20, 1824, ms. *Journal of Proceedings* (1822) (unpaged); United States-British Mixed Claims Commission, May 8, 1871, Rule 20, Feb. 10, 1872, Howard's Report (1874) 263. For the practice followed by the United States-German Mixed Claims Commission of 1922, see Bonyng's Report (1934) 7-10.

After a lengthy discussion, the American and British Commissioners were unable to agree on the procedure to be used in using the evidence obtained by the British Commissioner from his Government under the 1822 Convention. They also failed to agree on a motion to submit the question to an umpire. See ms. *Journal*, *op. cit.*, sessions of April 12, 13, 16, 18, 26, 1825.

³⁷ 23 Stat. 283.

In some instances tribunals have invoked in support of awards evidence produced in other cases before them. Thus Umpire Duffield of the German-Venezuelan Mixed Claims Commission of 1903 in the *Mohle* case "deemed it entirely proper to refer to the evidence put in the claim of Van Dissel by the Commissioner for Venezuela [Ralston's Report (1904) 565], stating the values of property of like character with that the values of which are disputed in this case."³⁸ In the *Harby Steamship Company* case, the United States-German Mixed Claims Commission of 1922 referred to the record in other cases as tending to show the value of a ship which had been sunk.³⁹ The United States-French Mixed Claims Commission of 1880, allowed the motion of the United States for the transfer of certain evidence from the *Rochereau* case to the *Petit* and *Archinard* cases, reserving until the final hearing "all questions as to the relevance and admissibility of the evidence."⁴⁰ This would seem to represent a desirable practice in proceedings before tribunals to which a number of cases have been submitted by the same party. It should, however, be limited to evidence of which the other party has had a proper opportunity to offer rebuttal, and concerning the applicability of which to the instant case there can be no doubt. In the limited instances in which there would be a possibility of invoking the rule, there would seem to be no sound reason for depriving the tribunal of the opportunity of resorting to facts satisfactorily established by evidence submitted in other cases before it.

It is clear that evidence produced in a case before a separate tribunal cannot be invoked unless produced regularly and in due form in the instant case, except in cases in which for special reasons the Arbitral agreement makes specific provision for such procedure, as has been done occasionally when a new tribunal is created to complete the unfinished work of a previous tribunal.⁴¹

OBLIGATIONS OF THE PARTIES

Section 26. General Nature of the Obligation to Produce Evidence. Lacking, in general, power to compel the attendance of witnesses or the production of documentary evidence by witnesses,

³⁸ Ralston's Report (1904) 574. The Umpire adverted to the fact that the competency of the evidence had not been questioned by the Commissioner for Germany in that case.

³⁹ *Administrative Decisions and Opinions*, etc. (1926) 695.

In a single opinion concerning the following cases Commissioner Wadsworth (United States-Mexican Mixed Claims Commission of 1868) relied upon his knowledge of certain facts derived from cases already before the Umpire: *Dickens* case, *Vivian* case, *Burleson*, *Laughlin* case, *Brattin* case, *Tumlinson* case, V ms. *Opinions* 420.

⁴⁰ *Minutes of Proceedings*, p. 434.

⁴¹ United States-Venezuela Mixed Claims Commission, Convention of Dec. 5, 1885, Art. V, 2 Malloy's *Treaties* 1861; *Pious Fund* case (United States v. Mexico), Convention of May 22, 1902, Art. III, 1 Malloy's *Treaties* 1196.

international tribunals are peculiarly dependent upon the industry and integrity of the parties to proceedings before them for the production of available evidence for the elucidation of the questions submitted for their decision. With respect to the parties themselves, such tribunals have considerable power to compel a reluctant litigant to disclose facts in its possession, such as the power, in effect, to give judgment by default against a Government which withholds decisive evidence. But even here the tribunals have no marshals who can bring in unwilling Government officials and compel them to divulge desired evidence. For these reasons, and because of the importance of having international controversies resolved on the basis of the facts of the situation as nearly as they may be determined, parties to international judicial proceedings have a more extensive obligation to produce all evidence within their control than that normally imposed upon litigants in municipal proceedings.

While inferences may sometimes be drawn in municipal proceedings against a party who is known to have withheld relevant evidence within his exclusive power, it cannot be said that a party to such a proceeding rests under an obligation to produce all the evidence in his control regardless of the effect on his own case. Such, however, has been held to be the obligation imposed upon parties to international proceedings. The United States-Mexican General Claims Commission went so far in the *Parker* case as to assert that the respondent Government was under an "obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be." The Commission declared further:

" . . . the parties before this Commission are sovereign nations who are in honor bound to make full disclosures of the facts in each case so far as such facts are within their knowledge or can reasonably be ascertained by them. The Commission, therefore, will confidently rely upon each Agent to lay before it all of the facts that can reasonably be ascertained by him concerning each case *no matter what their effects may be.*" [Italics added]⁴²

This is a high standard, and the question naturally arises whether it is generally accepted as an obligation by parties to international proceedings and adhered to in practice by their representatives.⁴³ Expression has been given to a similar view in a number of cases. During the course of the oral arguments in the *British Guiana-Venezuela Boundary Arbitration*, when Counsel for Great Britain made the remarkable assertion that a party was

⁴² *Opinions* (1927) 39-40. See *supra*, sec. 22, and *infra*, sec. 31.

⁴³ Feller gives it as his "impression gained from a study of the cases [before the Mexican Claims Commissions] that the agents generally complied with the duty laid upon them" in this respect. *Mexican Commissions*, p. 262.

"entitled in this kind of enquiry honorably to withhold documents," Lord Russell, one of the arbitrators observed:

"I question the correctness . . . of that statement . . . if the documents withheld would show that some contention of fact advanced would not be well founded, if the documents withheld were forthcoming, that would not be honest or straightforward." ⁴⁴

Presiding Commissioner Verzijl of the French-Mexican Claims Commission said in his opinion for the Commission in the *Pinson* case, after citing with approval the opinion in the *Parker* case, that "international relations are of such importance and the observation of justice in their development is so necessary, that it would be a crime . . . to wish to degrade international suits . . . to the level at which so many suits between individuals are carried on." He added that he was "convinced that the honor of their countries would prevent the French and Mexican Agencies from acting contrary to the principles enunciated in the passages above cited." ⁴⁵

The obligation of the parties with respect to the disclosure of facts within their possession is stated much more cautiously in the Hague Convention of 1907, which provides in Article 75 that "the parties undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the case." This provision, if literally adhered to, would put a tribunal quite at the mercy of the parties. It seems fairly certain that few, if any tribunals, have ever considered parties before them to have such broad discretion in determining what evidence they might produce or withhold.⁴⁶ Such a provision was not included in the Statute of the Permanent Court of International Justice. While it contains no specific statement of a general nature with reference to the obligation of parties to produce evidence, its general provisions, and the regulations embodied in the Rules appear definitely to contemplate a full disclosure by the parties of evidence

⁴⁴ *Proceedings* (1899), vol. VIII, p. 2358.

⁴⁵ Cited in Feller, *Mexican Commissions*, p. 263. For opinions expressing a similar view to that in these cases, see *Ship "Ganges"* case (United States Court of Claims), *Opinions in French Spoliation Cases* (1912) 183-186; *Kelly* case (Gt. Britain v. Mexico), Nov. 19, 1926, Dissenting Opinion of Commissioner (British) Percival, *Decisions and Opinions*, p. 113. See also *Palmas Island* case (United States v. The Netherlands), Jan. 23, 1925, *Arbitral Award* (The Hague, 1928) 34-36; *Larrieu* case (Spanish Treaty Claims Commission, Act of March 2, 1901), "Statement of Facts and Brief for Defendant," pp. 42-43, *Briefs for Claimants and the Government*, vol. 23, No. 468 B.

⁴⁶ See, however, the limitations imposed upon this section by the provisions of sections 63, 64, 68, 69. Also see the following provision contained in Art III of the *Compromis* of March 4, 1930, in the *Chevreau* case (France v. Gt. Britain):

"The parties agree to furnish to the arbitrator in as great a measure as they deem possible, all the information necessary for the decision of the litigation." *Compromis, Protocoles des Séances*, etc. (The Hague, 1930) 2.

in their control. In its practice, the Court has made it clear that parties are expected to furnish the Court with the pleadings with all available relevant evidence, or as soon thereafter as the need of it may appear.

While practice may not yet have established the rule of the *Parker* case as a definite legal obligation, the cases indicate tribunals tend to require of parties a very full disclosure of evidence in their possession as a condition precedent to an award. Representatives of states may not always maintain in practice the high standard set by that case, but there are indications of an increasing awareness on their part of the wisdom of disposing of international controversies upon their actual merits on the basis of all evidence which can reasonably be procured.⁴⁷

Section 27. Notice of Evidence. In general, in civil cases under Anglo-American law, a party is not required to give notice to his opponent of the names of witnesses whom he intends to produce or of what he intends to prove by them.⁴⁸ As to documents, no notice is required, but by statute a limited right of inspection before a trial has been accorded.⁴⁹ These rules are based upon what Wigmore describes as the "sportsmanship" character of Anglo-American law, and proceed upon the theory that a party is entitled to whatever benefit may be derived from the element of surprise. In the civil law, on the contrary, parties are required to state by what evidence they intend to prove their allegations of evidentiary facts, and the court then orders the evidence to be submitted as to those allegations it considers material.⁵⁰

⁴⁷ "The effort of the Agents of the two Governments in the proceedings before the Commission has been in the great majority of claims to develop the facts in each case in order that justice might be meted out to each claimant. In pursuance of this policy, the Agents, with a few notable exceptions later referred to, have freely conferred, and each Government involved has made a disclosure of all facts within its knowledge that might have any bearing upon the merits of the different claims. . . .

"In a very large number of cases, after full investigations by both Agents, it was found that there was no disagreement as to the facts or as to the liability of Germany under the Treaty and the decisions of the Commission, and in such cases the Agents of the two Governments prepared Agreed Statements of the facts with recommendation for such award as in the opinion of the Agents the evidence warranted. . . .

"In the great majority of cases, merely involving financial liability on the part of Germany, the Agents of the two Governments have freely conferred and cooperated in the development of the facts. This procedure, however, has not prevented either Agent from presenting vigorously his respective contentions on disputed questions of fact or law involved in the contested cases. The procedure outlined did not prevail, the American Agent regrets to state, in cases which affected the governmental policies of the German Government, particularly the patent infringement cases and the sabotage cases, which will later be reviewed." Bonyng's Report (1934) 7-9.

⁴⁸ III Wigmore's *Evidence* 926, 953.

⁴⁹ *Ibid.* 968-992.

⁵⁰ See, for example, Arts. 282, 371, 373, 403, 420 of the German Code of Civil Procedure of 1933.

The Rules of the Permanent Court of International Justice are designed to prevent any party from being surprised by evidence produced by his opponent. Article 43 provides that the case and counter case shall each contain a list of the documents in support.⁵¹ Under the terms of Article 49 "in sufficient time before the opening of the oral proceedings," each party is required to "inform the Court, and, through the Registry, the other parties, of the names, Christian names, description and residence of witnesses and experts whom it desires to be heard." The parties are required further to "give a general indication of the point or points to which the evidence is to refer." Similarly, subject to Article 48 of the Rules,⁵² it is provided that each party must "indicate all other evidence which it intends to produce or which it intends to request the Court to take including any request for the holding of an expert inquiry." In the discussion which took place at the time of the adoption of this article, it was stated to be the sense of the Court that it did not involve the forfeiture of any right, and that the Court remained free to admit evidence which seemed to it essential, and of which the required notice may not have been given.⁵³ In summary proceedings it is provided in Article 72 of

⁵¹ "On December 7, 1931, the Court decided that on principle and for the future, the attention of governments interested in cases for advisory opinion should be drawn in good time to the fact that Article 40, paragraph 1, head 4, and paragraph 3, head 5, of the rules (list of documents in support) was regarded as applicable by analogy in advisory proceedings.

"The Registrar, when unofficially drawing the attention of the Agents of the applicant governments to the above mentioned decision of the Court in the contentious case concerning the interpretation of the Memel Statute, explained that the Court appeared to incline towards an interpretation of Article 40 of the Rules to the effect that there must be a list of documents cited in the case itself, and that the documents enumerated in this list must be annexed to the Case. Accordingly, he requested the Agents to submit at all events a portion of the documents cited in the Case before the opening of the hearings. The Agents replied that the reason why they had not produced documents in support had been that these documents were undoubtedly known to the other side; they would, however, be able to produce most of these documents, if requested to do so. The Court decided to instruct the Registrar to address a request to this effect to the Agents of the applicant Powers." Series E, No. 8, p. 261.

⁵² For text of Art. 48, see Appendix II. Cf. Art. 47, 1931 Rules, Appendix III.

⁵³ See Series D, No. 2 (3d add.) 619-623. See also *ibid.* 873.

The Second Committee, appointed by the Court to study the revision of the Rules, made the following comment upon Art. 47 of the 1931 Rules, from which this Article is derived: "In any case in future in which oral evidence is to be heard, the necessary arrangements will require more preparation than the mere notification contemplated by this Rule. The Court will probably wish to have the evidence taken before a single judge, or a delegation of judges, or a commission, and all this would have to be arranged by the President under Rule 33.

"If a rule of this kind is maintained, it should extend to interested governments and organizations as well as parties, so as to cover advisory cases, . . ." *Ibid.* 770.

the Rules that "The written statements . . . shall mention all evidence other than the documents referred to in the preceding paragraph, which the parties may desire to produce."

These rules are intended to insure that all available evidence will be produced during the course of the proceedings. They are salutary in effect, and based upon the conviction that the element of surprise has no proper place in international proceedings.

Neither arbitral agreements establishing *ad hoc* tribunals, nor the rules of procedure of such tribunals, ordinarily contain any rules concerning the notification of evidence, principally because it is rare that oral evidence is taken in proceedings before them. In the case of claims commissions, the matter is left to the rules of procedure. These rules usually contain no provision concerning notice or listing of documentary evidence, but as previously pointed out one party is generally entitled to discovery of documents in the exclusive possession of the other.⁵⁴ Where provision is made for the submission of oral evidence to such commissions, it is customary to include in the rules a requirement that due notice be given to the other party of the intent to submit such evidence. If the testimony is to be taken by deposition and not before the tribunal, the rules usually provide that notice shall be given within a specified time of the intent to take such depositions. They provide that the notice shall state the name of the witnesses to be examined, and the place of the examination, and that it shall be accompanied by a copy of the interrogatories to be propounded to the witness, or as precise as possible a statement of the points intended to be proved by the witness.⁵⁵ If the witness is to be examined before the Commission, it is generally provided that notice shall be given within a specified length of time after the filing of the last pleading, stating the number, names and addresses of the witnesses whom it is proposed to examine.⁵⁶ In gen-

⁵⁴ *Supra*, sec. 22.

⁵⁵ "VII. All depositions shall be taken on notice, specifying the time and place of taking, to be filed in the office of the Commission, with a copy of the interrogatories, or upon a statement in writing by the advocate of the Government adducing the witness, to be filed in like manner, showing the subject of the particular examination with sufficient precision to be accepted by the advocate of the Government against whom such witness is to be produced, to be signified by his endorsement thereon. Such interrogatories or statement to be filed in the office of the Commission at least twenty-one days before the day named for the examination." United States-Spanish Mixed Claims Commission, Feb. 12, 1871, *Regulations*, June 10, 1871, III Moore's *Arbitrations* 2170. For similar provisions see the rules of the following claims commissions: United States-British, May 8, 1871, Rules, Art. 6, *ibid.* 2202; United States-French, Jan. 15, 1880, Rules, Art. XIV, *ibid.* 2214; United States-Venezuelan, Dec. 5, 1885, Rules, Art. XII, *ibid.* 2228; United States-Chilean, Aug. 7, 1892, Rules, Art. XII, *ibid.* 2233; United States-Paraguayan, Feb. 4, 1859, Rules, Art. IV, *ibid.* 2236.

For a full account of the taking of depositions, see *infra*, secs. 52, 73.

⁵⁶ "Should agent of either Government desire to take oral testimony before the Commission in any case, he shall, within fifteen (15) days from

eral, no oral testimony will be heard except on notice duly given in pursuance of the rules.⁵⁷

Section 28. Responsibility of States for Evidence Produced. During the course of the discussion of the revision of the Rules of the Permanent Court of International Justice in 1926, the President, M. Huber, introduced a proposed new rule intended specifically to ascribe to the parties responsibility for documentary evidence introduced by them. The proposal provided:

"Article 33 bis: States or Members of the League of Nations which are Parties to a dispute or which furnish information to the Court in the course of advisory procedure shall be held solely responsible for the production of any particular document and for any statement made on their behalf during the proceedings. Should one of the Parties submit or mention a document which the other Party considers a secret, or should it make statements which the other Party regards as bearing upon documents or facts which should remain secret, the Party concerned may demand that the proceedings shall be conducted in private in conformity with Article 46 of the Statute. The Court,

the expiration of the time for filing the reply of the claimant in such case, give notice to that effect by filing such notice in writing with the secretaries, as in these rules provided, stating the number and the names and addresses of the witnesses whom he desires to examine and the date on which application will be made to the Commission to fix a time and place to hear such oral testimony. No oral testimony will be heard in any case, except in pursuance of notice given within the time and in the manner herein stated, unless it be allowed by the Commission, in its discretion, for good cause shown." United States-Mexican General Claims Commission, Sept. 8, 1923, Art. IX, Mimeograph copy, Dept. of State, Feller, *Mexican Commissions*, pp. 379-380. For similar provisions, see the rules of the following claims commissions: United States-Mexican Special Claims Commission, Sept. 10, 1923, Rules, Art. IX, *Rules of the Special Claims Commission* (Washington, 1925) 39-40; French-Mexican, Sept. 25, 1924, Rules, March 23, 1925, Arts. 29-30, *Règlement de procédure* (1925); German-Mexican, March 16, 1925, Rules March 6, 1926, Arts. 29-30, *Convención de reclamaciones*, etc. (1925) 14; British-Mexican, Nov. 19, 1926, Rules, Sept. 1, 1928, Arts. 27-28, *Decisions and Opinions*, p. 14; Spanish-Mexican, Nov. 25, 1925, Rules, Arts. 33-34, *Reglas de procedimiento* (1927); Italian-Mexican, Jan. 13, 1927, Rules, Dec. 6, 1930, Art. 30, pars. (a), (b), *Reglas de procedimiento* (1931) 14. See also Arts. I, XI of the Rules of the Anglo-Chilean Mixed Claims Commission of 1893, *Reclamaciones (1894-1896)*, vol. I, pp. xx-xxi, and comment on failure to observe the rules, *Informe del Agente de Chile* (Santiago, 1896) 19, 21.

With reference to procedure in the examination of witnesses see *infra*, sec. 72.

⁵⁷ "The Brazilian-Bolivian Arbitral Tribunal . . . [declared] 'that documents not accompanied by summons of the defendant were insufficient.' [Citing Helio Lobo's Report (1910) 53] . . .

"We should note that the arbitrator between Italy and Peru held that the claimant, having once notified the fisc in accordance with law and having given him a list of witnesses, was held not responsible for his non-appearance or for vices of form attaching to proofs that the authority presiding at the inquest did not correct and not affecting the basis of the claim or its truthfulness." [Citing case of *Agustin Arata*, Descamps and Renault's *Recueil* (1901), 709.] Raiston, *Law and Procedure* (1926) 215.

when deciding upon the request that the proceedings shall be secret, shall at the same time decide whether the evidence in question is admissible."

The President explained that his proposal was intended to cover two situations, the first in which a party proposed to introduce a document regarded by the other as secret, and the second in which a party made statements or proposals of an invidious nature.⁵⁸ He said that "it would be well for the Court to establish once and for all the principle of the exclusive responsibility of Parties," and added that, "Parties appearing before the Court were invariably sovereign States, but the corollary of such sovereignty was the absolute responsibility of the representatives of such States." A number of members of the Court opposed the proposal on the ground that it was both "superfluous and useless."

Lord Finlay "thought that the Court, which fulfilled a public duty could not in any case be held responsible for documents submitted by one or the other of the Parties." The President agreed that "it was certain that States were responsible for what they did," but that he considered it important to state that principle positively in the Rules to remove any possibility of the Court being held responsible. M. Weiss said that if the principle of responsibility were embodied in the rules a sanction should be attached to it, but "the Court had no means of enforcing such a sanction." In M. Loder's view there was no possibility "of holding the Court responsible for an act on the part of one of the Parties," and he considered that the last sentence was not admissible as the Court according to its practice must give an opinion as to the admissibility of evidence only after private deliberation.⁵⁹ He added that it was clear that the Court could under the Statute and its existing rules, by an interlocutory decision, after having heard the Parties, in public or private, refuse to accept particular evidence, such as a secret document.⁶⁰ Judge Moore indicated that the proposal was objectionable because it "seemed to leave the Parties free to produce any evidence which they might wish."

The President withdrew his proposal "as nearly all the members" appeared to regard it "as useless or even dangerous."⁶¹

The views elicited by this proposal are illuminating and important because of their indicating the clear conviction of a large majority of the Court on the following propositions:

⁵⁸ Series D, No. 2 (add.), pp. 124-125, 251. See also his memorandum of Dec. 31, 1925, *ibid.* 250.

⁵⁹ *Ibid.* 127-129.

⁶⁰ For a discussion of the cases in which the Court has declined to consider certain documents because of their confidential character, see *infra*, sec. 88.

⁶¹ Series D, No. 2 (add.), p. 131.

1. That states are responsible on general principles for the evidence they produce, and that they are under a positive duty to refrain of their own volition from producing evidence of an invidious character.

2. That the Court has power under existing rules to refuse to permit the production of evidence which for any reason it could not properly take into account and make public in reaching its decision.

Implicit in the Court's rejection of the proposal, but only stated explicitly by one or two members, is the conclusion that the Court has a duty of its own motion to prevent the production of documents that might prove embarrassing. The principles stated are universal in application. States participating in international judicial proceedings are obliged to assume a particular responsibility for the consequences of their own conduct in the introduction of evidence principally for two reasons, first, that as sovereign states they are subject to a limited extent to external compulsion, and secondly, that international tribunals, lacking positive physical sanctions, must demand of parties appearing before them an assumption of responsibility not customarily required of litigants in private law.⁶²

Section 29. Burden of Proof. Burden of proof, in the strictly technical sense of the term, is a concomitant of a maturely developed system of pleadings and of a well defined body of rules of evidence allocating the duty of bringing forward the evidence to substantiate the contentions developed by the pleadings, and prescribing the character and quantum of evidence required to fulfill this duty, both during the pleadings and upon the submission of the case to the court for decision. As international judicial procedure has not developed a technically complete system of either of these features, it is natural that detailed rules have not been developed specifically determining the location of the burden of proof in given situations. A further factor in preventing the growth of technical rules concerning the burden of proof is that in international adjudications between states in their own right (as distinguished from proceedings before claims commissions), there has in many cases been no distinction in the position of the parties as plaintiff and defendant.⁶³ With the pleadings going forward simultaneously, a division of the burden of proof can at best be determined with difficulty and then late in the proceedings, other than the ultimate burden of substantiating with satisfactory evidence affirmative contentions made, or of rebutting contentions

⁶² Cf. sec. 26, *supra*.

⁶³ With reference to the terms used to designate the prosecuting and the defending parties in municipal and in international law, see Harvard Research in International Law, *Competence of the Courts in Regard to Foreign States* (Cambridge, 1932), Art. 1 (c) and (d), and comment, pp. 489-490.

thus substantiated.⁶⁴ Parties in such cases are inclined to resist any suggestion of treating them as plaintiffs or defendants.⁶⁵

In this respect, the international practice appears to approach more nearly to that of the civil law than of Anglo-American law. The burden of proof in Anglo-American law has a double aspect consisting in what Wigmore defines as first, the burden of the "risk of nonpersuasion of the jury," and second, the burden "of producing evidence to satisfy the judge," or the "burden of proceeding" as it is more frequently called. The first is constant, depending on the facts in issue, the second continually shifts during the progress of the trial.⁶⁶ The rule in civil law procedure is much simpler, due probably to the absence of a jury in civil cases. Bonnier says of French law, for example:

"There is a great advantage in the position of the defendant since it is admitted in our law that the burden of proof is always upon the plaintiff. The considerations which militate in favor of this view conduce to the recognition that, failing to establish his case, the plaintiff must fail. There would no longer be a burden of proof (*onus probandi*), if the failure would not be fatal to that of the two parties who must establish proof."⁶⁷

The broad basic rule of burden of proof adopted, in general, by international tribunals resembles the civil law rule and may be simply stated: That the burden of proof rests upon him who asserts the affirmative of a proposition which if not substantiated

⁶⁴ For example, the United States-Mexican General Claims Commission declared in the course of its opinion in the *Parker* case: "The absence of international rules relative to a division of the burden of proof between the parties is especially obvious in international arbitrations between governments in their own right, as in those cases the distinction between a plaintiff and a respondent often is unknown, and both the parties have to file their pleadings at the same time. Neither the Hague Convention of 1907 . . . nor the Statute and Rules of the Permanent Court of International Justice . . . contain any provision as to a burden of proof." *Opinions* (1927) 40.

⁶⁵ An instance of this may be found in the division of opinion which arose between Japan on the one hand and France, Germany, and Great Britain, on the other, in the *Perpetual Leases* case. In their *Mémoire* the three Governments referred to themselves as plaintiffs and Japan as defendant. Japan in her *Contre-Mémoire* asserted that "this pretention was unfounded from every point of view." In her *Statement of Objections*, she contended that if either party could properly be considered a defendant it was the three Governments, since the issue was whether they had violated the terms of their treaties with Japan. *Statement of Objections of the Imperial Japanese Government to the Contre-Mémoire and Conclusions of the Governments of Germany, France, and Gt. Britain* (The Hague, 1904) 2, 82.

⁶⁶ V Wigmore's *Evidence* 434, 440-456. See also McCormick, "Evidence," *Encyclopedia of Social Sciences*, op. cit. 643.

⁶⁷ Bonnier, op. cit. 34, translation. See also Lessona, op. cit. vol. I, pp. 129-130, 165; Capitant, op. cit. 349-350.

The Franco-German Mixed Arbitral Tribunal declared in its opinion in the case of *Firme Ruinart Père et Fils v. Frangmann* that "in the absence of a provision to the contrary in the Treaty, it could not be held to the usual principle which puts the burden of proof upon the plaintiff." 7 *Recueil des décisions* 599, 601 (1927).

will result in a decision adverse to his contention.⁶⁸ This burden may rest on the defendant, if there be a defendant, equally with the plaintiff, as the former may incur the burden of substantiating any proposition which he asserts in answer to the allegations of the plaintiff. Thus in the case concerning the *Legal Status of Eastern Greenland*, Norway was, in effect, in the position of defendant as the case was instituted by application by Denmark. Norway argued that in the legislative and administrative acts of the eighteenth century on which Denmark relied as proof of the exercise of her sovereignty, the word "Greenland" was used not in the geographical sense, but only as designating the colonies or colonized areas on the West coast. The Permanent Court of International Justice ruled concerning this contention in its Judgment of April 5, 1933, that this was "a point as to which the burden of proof lies on Norway." In support of this view the Court observed:

"The geographical meaning of the word 'Greenland,' i.e. the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention. In the opinion of the Court, Norway has not succeeded in establishing her contention.

"... If it is argued on behalf of Norway that these treaties [commercial treaties] use the term 'Greenland' in some special sense, it is for her to establish it, and it is not decisive in this respect that the northern part of Greenland was still unknown. She has not succeeded in showing that in these treaties the word 'Greenland' means only the colonized area."⁶⁹

⁶⁸ Cf. the following statement made by Lord Phillimore during the proceedings of the Advisory Committee of Jurists which prepared a draft of the Statute for the Permanent Court of International Justice in discussing the law which the Court should apply:

"Another principle . . . is that by which the plaintiff must prove his contention under penalty of having his case refused." *Procès Verbaux of the Proceedings of the Committee*, June 16-July 24, 1920 (The Hague, 1920) 316.

An interesting question arose in the *Royal Bank of Canada and Central Costa Rica Petroleum Co.* case in which Great Britain asserted without making any formal proof, that the Petroleum Co. had been financed largely by British capital. When Costa Rica raised an objection for the first time in the counter case, on the grounds of the nationality of the company, Chief Justice Taft, sole arbitrator, held that in view of an admission of nationality (prior to the arbitration) and "the lack of distinct challenge prior to the Counter-case," he could "not regard it as substantial," but that if it had been clearly made in previous correspondence "the failure to make proof might have raised the question of law urged." *Opinion and Award* (Washington, 1923) 47.

⁶⁹ Series A/B, No. 53, pp. 49, 52.

The Permanent Court has made few references to the question of burden of proof.

In its judgment on the merits in the *Mavrommatis Jerusalem Concessions* case, the Court dismissed the Greek Government's claim for indemnity,

It was contended by the United States in the *North Atlantic Coast Fisheries* case that the right did "not reside independently in Great Britain," to regulate the liberties in the use of certain British ports and territorial waters, conferred upon American fishermen by the Treaty of 1818. The Tribunal declaring that such right to regulate was "an attribute of sovereignty and as such must be held to reside in the territorial sovereign, unless the contrary be provided" and that "failing proof to the contrary the territory is coterminous with the sovereignty, it follows that the burden of the assertion involved in the contention of the United States . . . must fall on the United States." The Tribunal proceeded to examine the "series of propositions" put forward by the United States "for the purpose of sustaining this burden," saying that each of them "must be singly considered," and, in the main, held adversely on those propositions.⁷⁰

saying that although it had been established that the action taken by the Mandatory for Palestine violated its international obligations, "no loss to M. Mavrommatis resulting from this circumstance has [had] been proved." It said with reference to another point in the same case:

"It is not contended by the Respondent that the Ottoman authorities ever treated the concession as null or that they took any steps to annul them; on the contrary, the validity of the contracts was taken for granted in all that passed between the authorities and M. Mavrommatis after the grant of the concessions.

"In these circumstances, the Court considers that it is for the Respondent to prove that the concessions are not valid, though it is indisputable that the reference to the Ottoman nationality of the beneficiary in the concessions is incorrect." Series A, No. 5, pp. 29, 51.

In the case concerning *Interpretation of the Statute of the Memel Territory* the questions submitted depended principally on the nature of certain conversations conducted at Berlin by M. Bottcher, President of the Directorate. In his dissenting opinion based primarily on the ground that the application was irregular in that it asked, in effect, for an advisory opinion rather than a judgment, M. Anzilotti observed concerning this point:

"Was there a burden of proof on the applicant Powers to show that the conversations at Berlin were purely of a private character—as was alleged by M. Bottcher himself, and by the representative of the German Government on the Council of the League of Nations? Or was the onus on the Lithuanian Government, as the counter-claimant, to prove that these conversations possessed that political character, contrary to the interests of Lithuania, which the Governor had regarded as justifying him in dismissing M. Bottcher? In my view, the whole question turned on this point of procedure. I willingly admit that the applicant Powers did not furnish satisfactory evidence in support of their case; but it is quite impossible to find in the documents adduced by the Lithuanian Government anything more than rather vague indications, merely serving as material for conjecture.

"In these circumstances, it seems difficult to admit that the Court could ignore the defects of the application. The truth seems to be, rather, that the seriousness of the initial irregularity of the application instituting proceedings has become increasingly manifest during the subsequent proceedings. In my view, all that the Court could do was to take note of this irregularity and declare that it would not entertain the application." Series A/B, No. 49, p. 355.

See also statement of M. Negulesco in his dissenting opinion in the case concerning the *Jurisdiction of the European Commission of the Danube* to the effect that the "onus of the proof" was not on Roumania but on the three Powers who contended that the European Commission had in fact exercised all its powers over the sector in question. Series B, No. 14, p. 124.

⁷⁰ *Proceedings* (1912), vol. I, p. 74.

A similar rule was asserted in the opinion in the boundary arbitration known as the *L'Oeil de la Mer* case. Hungary based her claim to the territory on the allegation that an Austrian subject had been expelled from it at the beginning of the seventeenth century by the King of Poland, and Austria, in support of her claim, presented a document showing that an Austrian subject had been placed in possession of the territory by the Polish King. The Tribunal, observing that according to the expert whose report had been obtained, the region was a homogeneous whole, concluded:

"Thus it is difficult to presume that Komorowski was only placed in possession of territory extending to the river from the lake of Poissons and that the smallest part of all this territory situated beyond this river on the right bank was abandoned to Hungary.

*"Following the rules of civil procedure, the burden of proof rests upon Hungary and not upon Austria. But it has not produced proof of the facts in question."*⁷¹ [Italics added.]

Instances of the application of this rule need not be multiplied.⁷² In several cases before the recent Mexican Claims Commission an apparently different rule has been applied. In the *Parker* case the United States-Mexican General Claims Commission declared categorically:

"As an international tribunal the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure."⁷³

In dismissing the claim in the *Archuleta* case for want of evidence that Mexico had failed to take adequate steps to punish the slayers, of the father of the claimant, the same Commission observed that

⁷¹ VIII Rev. de droit int. et de leg. comp., 2d Series, (1906) 162, 200, translation.

⁷² For cases in accord with those cited in the text, see *Islands in Passamaquoddy Bay and Bay of Fundy* case (United States v. Gt. Britain) Dec. 24, 1814, *Case and Reply of the United States*, 6 Moore's *Adjudications* 49-219; *Collins* case, (Board of Commissioners, Act of March 3, 1849) ms. *Opinions*, 1849, vol. 2, pp. 617, 620-621; "*Schooner Susan*" case, *ibid.*, vol. 1, pp. 441-448; *Green* case, *ibid.*, vol. 2, pp. 770, 778-779; *Bennett* case (United States v. Mexico), July 4, 1868, IV ms. *Opinions* 616; *Case of the "Queen"* (Brazil v. Sweden-Norway), Award of March 26, 1873, Lapradelle and Politis, *Recueil*, vol. II, pp. 708-710; *Alsop* case (United States v. Chile), Dec. 1, 1909, Award (1911) 31; *Schooner "Nantasket"* (United States Court of Claims), *Opinions in French Spoliation Cases* (1912) 581; *Ewart* case, (United States v. Germany), Aug. 10, 1922, *Administrative Decisions and Opinions*, etc. (1925) 581; *Jessie Taft Smith and John W. Smith* case, *ibid.* 470; *Motte v. État hongrois* (Hungarian-Belgian Mixed Arbitral Tribunal), 7 *Recueil des décisions* 822 (1927); *Compagnie des Indes et de l'Extrême-Orient v. Schaefer et Office allemand* (Franco-German Mixed Arbitral Tribunal), 8 *Recueil des décisions* 155 (1928). See also *Banque de Orient v. Gouvernement turc* (Turkish-Greek Mixed Arbitral Tribunal), 7 *Recueil des décisions* 967, 973 (1928). See also the *Geneva Arbitration* (United States v. Gt. Britain), May 8, 1871, *Proceedings*, 1872 For. Rel., pt. II, vol. 3, pp. 423, 482.

⁷³ *Opinions* (1927) 39.

while the records produced by Mexico contained "very scant information" and were "not such as to create a definite impression that effective measures were taken by the authorities," the United States had "produced practically nothing bearing on the question of negligence." It concluded that it was "not called upon to give effect to any rule of evidence with regard to the burden of proof," but that "it must decide the case on the strength of the evidence produced by both parties."⁷⁴ Apparently the French-Mexican Commission was the only other one to give explicit approval to the rule, quoting the *Parker* case with approval,⁷⁵ but the British-Mexican and the German-Mexican Commissions "took into account the failure of the respondent Government to introduce evidence rebutting that offered by the claimant."⁷⁶

The decisions in these cases do not represent as great a divergence from the rule stated in the earlier cases, as the language of the opinions seems to indicate. In the *Parker* case the Commission held, in effect, that Mexico, by not bringing forward easily obtainable official records, had failed to sustain her denial of the validity of the American case. On the other hand the United States was penalized in the *Archuleta* case for failing to produce evidence to substantiate her allegation of the failure of Mexico to take adequate steps to punish the murderer of the father of the claimant. What the Commission actually did in both cases was to accept something short of the best evidence, because the other party had failed to carry out the burden resting on it to make good its contentions by producing evidence in support. It is to be noted that in one case the losing party was claimant and in the other respondent. In its actual effect, the Commission's action resembled an application of the Anglo-American rule of the "burden of proceeding." As the opposing party in each case failed to carry forward its case by producing adequate evidence, award was made in favor of the other on the basis of *prima facie* evidence entitling it to judgment. In the earlier cases cited, the burden envisaged by the tribunals was what might be called the "burden of ultimate proof," that is the constant burden of establishing by evidence any essential affirmative proposition, put in issue by either party.

⁷⁴ *Opinions* (1929) 76.

⁷⁵ *Pinson* case, *Jurisprudence de la Commission franco-mexicaine des réclamations*, pp. 94-95.

⁷⁶ Feller, *Mexican Commissions*, citing *Mexico City Bombardment Claims* (British-Mexican Commission), *Decisions and Opinions*, pp. 100, 104, and *Plehn* case (German Mexican Commission), unpublished, Feller, *op. cit.* 263.

In the *Chevreau* case (France v. Gt. Britain), March 4, 1930, the Arbitrator, M. Beichmann, declined to accept the contention of Gt. Britain that the burden of proof fell on France as plaintiff, saying that "there could be also an obligation to prove the existence of facts alleged to deny responsibility" [for the expulsion of Madame Chevreau from British territory]. *Sentence rendus en execution du compromis signé à Londres le 4 mars 1930*, etc., Mimeograph Copy, Dept. of State Library, p. 51.

The two groups of cases are virtually in accord at this point. Judgment in both the principal Mexican cases went against the losing parties because of their failure to meet this "burden of ultimate proof," or as Wigmore calls it the burden of "non-persuasion of the jury," the jury in these cases being the tribunal.

However, in stressing the obligation of both parties to produce evidence in their possession, these cases represent a sound conclusion. They go too far only in suggesting that there is no rule of burden of proof in international proceedings. There are no technical rules such as those found in Anglo-American law. But there is a primary burden on him who asserts to prove his assertion, and that rule should be maintained, especially in claims commissions.⁷⁷ This primary burden is seldom strictly enforced in the municipal law sense, as tribunals will accept less satisfactory evidence than would be required in municipal procedure if the opposing party fails to produce evidence in his possession, or if in the face of some proof he fails to substantiate his own claim by any acceptable evidence. In other words, a party cannot simply assert or deny a proposition, and then rest his case upon a technical rule throwing the burden of proof on the other party without running a risk of adverse inference being drawn from his failure to produce evidence. In stressing this secondary burden, the Mexican Commission cases serve to clarify the true nature of the rule of burden of proof applied in international procedure.

It should be observed, however, that international tribunals are not generally content to rest a decision simply upon the ground of a failure by a party to maintain the burden of proof resting upon him. If a party fails to bring forward satisfactory proof, tribunals in practice customarily exercise the discretion usually vested in them by requiring a further production of evidence by one or both parties, or by appointing experts to make appropriate inquiries or making researches on their own initiative.⁷⁸ The latter

⁷⁷ "Undoubtedly the burden of proof falls upon the claimants before commissions as in other cases, except in so far as such burden may be removed by the provisions of the protocol. The claimant's case once made out, the burden is transferred to the defendant, . . ." Ralston, *Law and Procedure* (1926) 220.

After quoting this statement, Feller asserts that he "cannot believe that such is 'undoubtedly' the rule, and would consider it highly undesirable if it were." *Mexican Commissions*, p. 261.

" . . . the rule, that there is no burden of proof in controversies between States is not properly applicable to international claims. In these the burden should clearly be thrown on the claimant, even though the form of the action is in the name of the State as plaintiff." Bishop, *op. cit.* 237-238.

"Le principe que le fardeau de la preuve incombe au demandeur est admis sans hesitation devant le juridictions internationales. Il repose sur des idees de justice et de logique qui n'ont jamais été discutées." G. Ripert, "Les regules du droit civil applicables aux rapport internationaux," *Académie de droit internationale, Recueil des Cours*, 1933, II, vol. 44, p. 646.

⁷⁸ See, in general, sec. 32, *infra*.

method can have but a limited use, except for researches into questions of law,⁷⁹ but may be undertaken by a tribunal so far as its facilities permit. In the absence of a specific provision in the arbitral agreement, however, a tribunal is under no obligation to undertake to supplement the evidence submitted. A party who fails to come forward with adequate proof of an affirmative allegation does so at his peril.

Section 30. Presumptions and the Burden of Proof. International tribunals may recognize certain legal presumptions as affecting the primary burden of proof, but the presumptions are so variously stated, and there is such a lack of uniformity in the circumstances of their application that no general rules in the matter can be stated. The problems involved may be illustrated by the statement of a few typical examples.

Parties not infrequently seek to bolster their cases by invoking legal presumptions alleged to obviate the necessity of their producing further evidence—evidence which perhaps does not exist. For example, in her Answer in the *Bolivian Peruvian Boundary Arbitration*, Peru asserted broadly that “the party who has a presumption in favor of his claim is freed from the burden of proof,” and that “the effect of the presumption is to consider the fact presumed as proved unless it is demonstrated to the contrary.” Such a contention obviously claims too much. Peru contended that she had raised such a presumption by presenting Royal Spanish Cédulas of March 1 and September 13, 1543, establishing the Audiencia of Lima. That Audiencia included “Peru, New Toledo, Quito, Papyon, Rio de San Juan and others,” yet Peru contended that Bolivia in asserting a right involving “any dismemberment of these districts” had the burden of proof to establish it.⁸⁰ Great Britain in the *British Guiana-Brazilian Boundary Arbitration* asserted that a presumption in favor of her title, throwing the burden on Brazil, was raised by her inheritance of a historical title from the Dutch and her alleged uninterrupted possession of the territory till 1838. These, of course, were the principal questions being arbitrated.⁸¹

In his opinion in the *Kerr* case before the United States-Mexican Commission of 1868, Commissioner Zamacoma asserted that

⁷⁹ “The Court . . . observes that in the fulfillment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it has had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement.” *The S.S. “Lotus”* case, Judgment No. 9, Permanent Court of International Justice, Series A, No. 9, p. 31.

⁸⁰ *Contestación de la República del Perú a la demanda de la República de Bolivia presentada a la Comisión asesora del gobierno argentino conforma al artículo 3 del reglamento procesal de 10 de noviembre de 1904* (Buenos Aires, 1907) 57.

⁸¹ *Argument on Behalf of His Britannic Majesty* (London, 1904) 131.

"when it is sought to judge of the action of the Courts and when this action has ostensibly been exercised in the manner prescribed by law, the legitimate presumption is that such action does not involve injustice, nor constitute a wrong."⁸² The soundness of this proposition as a general principle is not open to doubt. Yet circumstances may invalidate any such presumption. In a *Brief of Argument for the Claimants* on the submission of the French Spoliation Claims to the Court of Claims, it was maintained that "neither the principles upon which the French courts proceeded, nor their methods of administering those principles were . . . of such a character as to entitle their adjudications to any considerable weight with any candid mind." Consequently, it was concluded "that no present presumption unfavorable to the claimants" could be "properly deemed to exist."⁸³ The Court of Claims acting, in effect, as an international tribunal in adjudicating these cases, undoubtedly enjoyed the prerogative usually appertaining to such tribunals to evaluate the weight as evidence of these French decisions, subject of course to the provisions of the statute conferring jurisdiction upon it, and to any generally obligatory rules of law.

Presumptions in favor of the validity of acts of various Government authorities are not infrequently invoked. Ralston cites as legal presumptions which have received the sanction of commissions, "the uniform presumption of the regularity and validity of all acts of public officials";⁸⁴ "the legal presumption . . . of the regularity and necessity of governmental acts";⁸⁵ the "presumption in favor of the government that it will be reasonable and will not be reckless and careless";⁸⁶ "the general presumption . . . that public officers perform their official duties. . . ."⁸⁷ He adds, however, that "the presumption relative to the rightfulness of governmental acts is not conclusive, and in some cases where the rule was recognized evidence counter to it was given preponderating weight."⁸⁸

Presumptions have often been invoked in relation to the proof of citizenship. In the absence of countervailing evidence effect has been given to the presumptions that complying with the rules of the commission raises a presumption of citizenship;⁸⁹ that residence in a territory before its annexation and for a long period thereafter

⁸² III ms. *Opinions* 467.

⁸³ *Brief of Argument for the Claimants*, p. 77.

⁸⁴ *Brewer, Moller and Co.* case (Germany v. Venezuela), Feb. 13, 1903, Ralston's Report (1904) 584.

⁸⁵ *Guerrieri* case (Italy v. Venezuela), Feb. 13, 1903, *ibid.* 754.

⁸⁶ *Bembelista* case (Netherlands v. Venezuela), Feb. 28, 1903, *ibid.* 900, 901.

⁸⁷ *Friedrick and Co.* case (France v. Venezuela), French-Venezuelan Commission of 1902, Ralston's Report (1903) 42.

⁸⁸ Ralston, *Law and Procedure* (1926) 223-224.

⁸⁹ *Wilkinson and Montgomery* case (United States v. Mexico), July 4, 1868, IV ms. *Opinions* 35.

raises a presumption of citizenship;⁹⁰ that testimony of birth in Mexico raised presumption of citizenship;⁹¹ that evidence "creating a strong presumption of citizenship" will be accepted in the absence of any evidence to challenge it;⁹² that a person who is a citizen under the law of one party will be presumed not to be a citizen of the other in the absence of proof of the law of the other party;⁹³ that a naturalization certificate constitutes *prima facie* evidence of citizenship, but is subject to rebuttal.⁹⁴

While certain presumptions, therefore, may affect the responsibility of a party for the production of evidence, they are seldom strictly applied by international tribunals. Any party relying upon such a presumption in place of assuming a primary burden to establish by competent evidence allegations on which he relies does so at his own risk.⁹⁵

Section 31. Adverse Inference From Non-Production of Evidence.⁹⁶ In municipal law the normal remedy in the event of the failure or refusal of a party to produce relevant documentary evidence known to be in his possession is resort to a writ by the court compelling production, such as a subpoena *duces tecum*, in Anglo-American law, or what is known as the *accion exhibitoria* in Italian law. Consequently, the area is not large in which adverse inferences may be drawn from failure of a party to produce evidence. When such a writ will not lie, the courts have but a limited power to draw adverse inferences from the nonproduction of evidence by

⁹⁰ *Shaben case, ibid.*, I ms. *Opinions* 522, 523-524.

⁹¹ *Longonia case, ibid.*, VI ms. *Opinions* 332.

⁹² *Austin case (United States v. Mexico)*, Sept. 8, 1923, *Opinions* (1931) 108, 110.

⁹³ *Lebret case (United States v. France)*, Jan. 15, 1880, *Boutwell's Report* (1884) 180, 183.

⁹⁴ *Govin y Pinto et al. cases (United States v. Spain)*, Feb. 12, 1871, *Opinion of the Arbitrator for Spain*, Dec. 26, 1882, *Record* (1871), vol. 16, Nos. 9, 45, 48, 49, 69, 73, 115.

⁹⁵ One or two other presumptions that have been invoked on occasion may be cited: "In this conflict of testimony we must give effect to that presumption which exists in favor of the party who defends." *Zaldivar case (United States v. Spain)*, Feb. 12, 1871, *Opinion of the Commission*, Dec. 26, 1882, *Record* (1871), vol. 16, No. 127; *Delmas case (United States v. Mexico)*, July 4, 1868, VII ms. *Opinions* 521-522 (*Opinion of Commissioner Wadsworth*); that before the Spanish Treaty Claims Commission the burden was on the United States to show due diligence on the part of Spain (Contention rejected by the Commission), *Opinion of Commissioner Chandler*, Op. No. 12, *Fuller's Report* (1907) 264; concurring opinion of Commissioner Maury, *ibid.* 324.

"En droit arbitral, il y a des faits pertinents et des faits non pertinents. Mais il n'y a que cela. Aucun système réglementaire complet n'a classé les uns et les autres dans une quelconque échelle de valeurs. Le droit international est encore trop sporadique pour en être arrivé à un tel stade; il est encore trop incomplet pour dégager un système de présomptions qui viendrait compléter le principe fondamental de répartition du fardeau de la preuve entre le demandeur et le défendeur." J. C. Witenberg, "La théorie des preuves devant les juridictions internationales," *Académie des droit international, Recueil des Cours*, 1936, II, vol. 56, p. 47.

⁹⁶ Cf. in general on the subject matter of this section, sec. 22, *supra*.

a party, and in fact do not have great need of such a power.⁹⁷ While international tribunals have in some cases been given power to issue a subpoena *duces tecum* to witnesses, they generally have no such power with respect to the parties.⁹⁸ Consequently the most effective sanction they have to impose upon parties negligent or recalcitrant in the production of evidence is the threat to draw an adverse inference against the party in the event of continued refusal to bring forward the needed documents.

The Statute of the Permanent Court of International Justice gives the Court power, in Article 49, to take "formal note of any refusal" in response to a request from it before the hearing begins calling "upon the Agents to produce any document, or to supply any explanations." This provision was derived from a similar one contained in Article 69 of the Hague Convention of 1907.⁹⁹ No occasion appears to have arisen calling for the exercise of this power by the Permanent Court. It is not clear, therefore, whether it would be construed to include the power similarly to take note

⁹⁷ In American law, for example, failure to produce may in certain cases be held to amount to an admission that no evidence of the sort can be had, such as failure to produce a witness, but in certain prescribed instances only, or in failure of the party to testify himself, but again an adverse inference is warranted only in narrowly circumscribed circumstances. Where a party refuses to allow inspection of a copy of a document before trial, statutes frequently provide that the judge may direct the jury to presume the document to be of the tenor alleged. Greenleaf, *op. cit.*, vol. I, pp. 326-327; III Wigmore's *Evidence* 991. See also *Runkle v. Burnham*, 153 U.S. 216 (1893); *Mammoth Oil Co. v. United States*, 275 U.S. 13 (1927).

Referring to the French law Lessona says:

"La doctrina, no obstante, se ha propuesto, para su resolución dicha cuestión. Carre admite la exhibición en caso de propiedad o de comunión, y en caso de documentos que existan en poder de un depositario público; pero Chaveau va mas allá, y admite que el Juez puede ordenar la exhibición de cualquier documento que pueda ilustrarla, cualquiera que sea la parte que le pida. Por el contrario, Garsonnet, salvo el caso de propiedad o comunión y el de expresa obligación de la ley, niega la acción exhibitoria: *Un plaideur s'expose même aux suppositions les plus défavorables, en refusant de montrer les titres qu'il possède et dont la communication lui est demandée; mais on ne peut rigoureusement exiger de lui la production de titres qu'on sait être en sa possession dans les quels son adversaire pourrait trouver la preuve de son propre droit, mais dont il s'abstient lui-même de faire usage.*" *Op. cit.*, vol. I, p. 75. See also pp. 78-87, and Bonnier *op. cit.* 597-603.

⁹⁸ See *infra*, sec. 69.

⁹⁹ "The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal the tribunal takes note of it."

In commenting upon the draft of the corresponding rule in the Hague Convention of 1899 [Art. 44], the Third Committee said in its report to the First Hague Conference:

"Among the powers recognized as appertaining to the Arbitral Court, to enable it to discover the truth, the Russian draft admitted the right of the tribunal 'to require the agents of the parties to present all papers or explanations which it needs.'

"The Committee thought that the sanction of this power, without reservation, was not desirable, and that there might be cases where refusal would be justified. The tribunal is to take note of such refusals, but it should not go beyond that." *Hague Conference Reports*, p. 82.

of a failure to produce a document in the absence of a request, or a refusal to do so in response to a request from the other party. It should be further noted that it is not specifically provided that the Court may draw an adverse inference from the nonproduction of evidence in any of these circumstances.

Ad hoc tribunals have frequently asserted the existence of a rule empowering them to draw adverse inferences from the failure of a party to produce evidence known or presumed to be in its possession, and have given judgment based upon the application of such a rule. In the *Parker* case before the United States-Mexican General Claims Commission of 1923, the claim was based upon indemnity for certain typewriting materials alleged to have been sold and delivered to certain agencies of the Federal Government in Mexico City and not paid for. With reference to the denial by the Mexican Government of the receipt of the materials, defense being based upon the failure of the claimant to present receipts of delivery, the commission, in making an award in favor of the United States, observed that the Mexican Agency could readily have ascertained who among its officials would have signed such receipts and produced evidence as to such signature, and said:

"The Commission denies the 'right' of the respondent merely to wait in silence in cases where it is reasonable that it should speak. . . .

"In any case where evidence which would probably influence its decisions is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it unexplained may be taken into account by the Commission in reaching a decision."¹⁰⁰

In the *Kalklosch* case the same Commission based an award upon secondary evidence of alleged illegal imprisonment and mistreatment, consisting principally of affidavits by witnesses and a report from the American consul, although Mexico had denied all the allegations of the complaint and declared none of them proved. On the ground that complementary records at the place of imprisonment could have been introduced, the Court refused to accept as sufficient reason for Mexico's failure to introduce rebutting evidence the allegation that the records at the place of arrest had been burned. It said that it could not "properly reject" evidence submitted by the claimant with his Memorial, "in the absence of official records the nonproduction of which had not been satisfactorily explained" and which contradicted "the evidence accompanying the Memorial."¹⁰¹ The same rule was relied upon in a number of other cases in this Commission, as well as in the other Mexican Claims Commissions.¹⁰²

¹⁰⁰ *Opinions* (1927) 39-40.

¹⁰¹ *Opinions* (1929) 126, 130.

¹⁰² *Hatton* case, *Opinions* (1929) 6, 10; *Kling* case, *Opinions* (1931) 36,

In the *Royal Bank of Canada and Central Costa Rica Petroleum Co.* case Chief Justice Taft, sole arbitrator, denied indemnity on account of losses alleged to have been suffered through the failure of Costa Rica to issue notes in accordance with its contract with the Bank in return for a deposit by it of 998,000 colons in the Banco International of Costa Rica. He gave as one of the reasons for his award the failure of the Bank to produce its accounts in response to a request from the Costa Rican Agent. The Bank having thwarted the effort of the Agent to obtain the accounts through Court process in Costa Rica, stated that it was willing, on order, to produce the accounts before the Commission, but Costa Rica objected to such *ex parte* production without a proper opportunity to comment upon them, and to ascertain whether they were complete. After pointing out that accounts introduced by the Costa Rican Agent made a *prima facie* showing that the deposit had been part of a transaction to make an advance of \$200,000 to President Tinoco and his brother at a time when the Bank knew Tinoco's fall was imminent, the Chief Justice said:

"These accounts taken from the Treasury Department were furnished by Costa Rica to the other side before this arbitration began, so that the Royal Bank has been long advised of their existence and contents. The failure of the Bank to produce any further statements of accounts from its own books in explanation of the accounts thus appearing on the government books not only makes these government accounts competent evidence, but also justifies inferences therefrom in the absence of explanation which the coincidence of dates and the circumstances shown by other evidence make inevitable." ¹⁰³

46; *Melcer Mining Co.* case, *Opinions* (1929) 228, 233; *Russell* case (United States v. Mexico), Sept. 10, 1923, *Opinions of Commissioners* (1931) 44, 95; *Mexico City Bombardment Claims* (Gt. Britain v. Mexico), Nov. 19, 1926, *Decisions and Opinions*, pp. 100, 104; *Plehn* case (Germany v. Mexico), March 16, 1925 (unpublished), cited in Feller, *Mexican Commissions*, p. 263.

See British-Colombian Mixed Claims Commission, Convention of July 31, 1896, Art. VIII, La Fontaine, *Pasicrisie internationale*, Berne, 1902, p. 545.

¹⁰³ *Opinion and Award*, etc., Oct. 18, 1923 (New York) 33, 37. Accord: *Heidsieck* case (United States v. France), Jan. 15, 1880, Boutwell's Report (1884) 123; *Schreck* case (United States v. Mexico), July 4, 1868, IV ms. *Opinions* 624; *Pious Fund* case, *ibid.*, VII ms. *Opinions* 459; French-Venezuelan Mixed Claims Commission of 1902, *Brun* case, Ralston's Report (1903) 25.

For further discussions of adverse inferences from nonproduction, taking a view similar to that in the cases stated in the text, see *Salvador Commercial Co.* case (United States v. Salvador), Dec. 19, 1901, *Shorthand Notes of Proceedings*, National Archives of United States, Book 3, pp. 3-6; *Costa Rica Packet* case (Gt. Britain v. The Netherlands), May 16, 1895, *Papers Relating to the Arbitration*, Brit. Parl. Pap., Cmd. 8428. Commercial No. 3 (1897) 13-14; *Rahming* case, (United States v. Gt. Britain), May 8, 1871, "Brief for the claimant," pp. 4, 5, *Memorials, Demurrers*, etc. (1871), vol. I, No. 7; *Gaughen* case, *ibid.*, "Brief for the claimant," pp. 1-4, vol. VI, No. 77; American Turkish Claims Settlement, Dec. 24, 1923, Nielsen's Report (1937) 64-66.

It has been held that difficulty in obtaining copies of official documents cannot be accepted as a reason for their nonproduction, especially when the evidence is of primary importance.¹⁰⁴ In the *Alsop and Co.* case, however, the United States-Peruvian Mixed Claims Commission of 1863 went so far as to dismiss the claim, it having been allegedly impossible for the Peruvian Government to obtain copies of certain proceedings in its courts, the examination of which the Umpire asserted to be a necessary prerequisite to forming a judgment.¹⁰⁵ Where the claimant has been guilty of laches in obtaining primary documentary evidence which he might easily have obtained by the exercise of reasonable effort at the proper time, recovery has been denied in the absence of very convincing secondary evidence of the validity of his claim.¹⁰⁶

The obligation of a party to produce evidence in its possession and not accessible to the opposing party is thus generally recognized. In the absence of a specific limitation in the arbitral agreement, tribunals have assumed that they possess power to draw an adverse inference from the failure or refusal of a party to produce such evidence. Unless a party can show a very convincing reason for not producing essential evidence in his possession or control, he withholds it on peril of an adverse decision. The obligation holds even with reference to evidence which may be adverse to a party's own interest. It seems reasonable to assume that, should the occasion require, the Permanent Court of International Justice would exercise the power to take proper account, in reaching a decision, of the failure or refusal of a party to produce evidence known to be in his possession.

THE AUTHORITY OF THE TRIBUNAL

Section 32. To Require the Production of Evidence. The obligation to produce the evidence necessary to substantiate the issues of law and of fact raised by the pleadings rests primarily upon the parties in international as well as in municipal procedure, the scope of the court's authority to intervene in the production of

¹⁰⁴ *Palmas Island* case (United States v. The Netherlands), Jan. 23, 1925, *Arbitral Award* (The Hague, 1928) 31, 34-35.

¹⁰⁵ Award of Umpire Herran, No. 24, 1865, ms. *Opinions and Awards* (1863) 61-62.

¹⁰⁶ *Levy* case (Board of Commissioners, Act of March 3, 1849), ms. *Opinions*, 1849, vol. II, pp. 583-584; *Ryder* case (Chinese Indemnity, Domestic Claims Commission, Act of Nov. 8, 1858), H. Ex. Doc. No. 29, 40th Cong. 3d Sess., p. 162; *Dantin* case (United States v. Mexico), July 4, 1868, IV ms. *Opinions* 55; *Fuente* case, *ibid.*, VI ms. *Opinions* 319, 320; *Villareal* case, *ibid.* 318, 319; *Chapa* case, *ibid.* 336; *Santos* case, *ibid.* 267-268; *Woodhouse* case, *ibid.* 358; *John Parrot* case, *ibid.*, IV ms. *Opinions* 589-590; *Durio* case (Spanish Treaty Claims Commission, Act of March 2, 1901), Opinion No. 40 (separately printed for the commission) 7-9.

With reference to the material covered in notes 100-106, cf. *infra*, sec. 35.

evidence being strictly secondary in character. In respect to this matter, however, international procedure seems to show more the influence of civil law procedure than of Anglo-American. In the latter, as previously stated, Wigmore says that the task of producing evidence is placed entirely upon the parties, it not being required or expected of the judge. He adds, however, that while judges very seldom exercise the power, they could, if they saw fit, "call a witness not called by the parties,—put additional questions to witnesses called by the parties, or inspect a place or a thing."¹⁰⁷ The powers appear to have atrophied from lack of use. In civil law procedure, the judge's functions although restricted, are more extensive than those just described. He takes the initiative in the examination of witnesses, he may require the production of further witnesses, he may on his own motion order an expert inquiry, or make an inspection of the premises, or he may require the production of further documentary evidence.¹⁰⁸

International tribunals are quite generally given the power in the arbitral agreement, in the event that the evidence produced during the proceedings be found incomplete or unsatisfactory, to require the production of such further evidence as they deem necessary to the elucidation of the case. Such a provision is sometimes embodied in the rules of procedure.¹⁰⁹ In some cases tribunals have been given the authority either upon their own motion, or at the request of the parties to call upon the foreign offices of the parties for the communication to the tribunal of certain specified papers, or of all papers relevant to a given case, or to the proceedings.¹¹⁰ Tribunals have not hesitated to exercise these powers.

¹⁰⁷ V Wigmore's *Evidence* 434-435.

¹⁰⁸ Engelmänn, *op. cit.* 617-620; Lessona, *op. cit.*, Vol. I, pp. 55-57; Sadek-Fahmy, *op. cit.* 329-341. See *supra*, p. 2.

¹⁰⁹ Yuille, *Shortridge and Co. case* (Gt. Britain v. Portugal), March 8, 1861, Lapradelle and Politis, *Recueil*, vol. II, p. 89; *Island of Bulama Arbitration* (Gt. Britain v. Portugal), Jan. 13, 1869, Art. IV, 61 Br. and For. St. Paps. 1163; *British Guiana-Venezuela Boundary Arbitration*, Rules of Procedure, Art. 10, 92 Br. and For. St. Paps. 467; *Alaskan Boundary Arbitration* (United States v. Gt. Britain), Jan. 24, 1903, Art. II, 1 Malloy's *Treaties* 789; *German-Venezuelan Mixed Claims Commission of 1903*, Rules of Procedure, Art. VI, Ralston's Report (1904) 519; *United States-Panamanian Joint Commission*, Nov. 18, 1903, Rules of Procedure, Art. IV, *Final Report of the Joint Commission* (1920) 21; *Alsop case* (United States v. Chile), Dec. 1, 1909, 3 *Treaties, Conventions, etc.* (Redmond, 1923) 2508; *Canevaro case* (Italy v. Peru), April 25, 1910, *Protocoles des Séances et Sentence, etc.* (The Hague, 1912) 6; *Landreau case* (United States v. Peru), May 21, 1921, Art. X, 3 *Treaties, Conventions, etc.* (Redmond, 1923) 2799.

As typical of the rules adopted by the Mixed Arbitral Tribunals, see Arts. 26, 27 of the Rules of the Anglo-German Mixed Arbitral Tribunal, 1 *Recueil des décisions* 116.

¹¹⁰ United States-Mexican Mixed Claims Commission, April 11, 1839, *Minutes of Proceedings* (1839), vol. I, pp. 377, 387; United States-Paraguayan Commission, Convention Feb. 4, 1859, Act of Congress, May 16, 1860, Sec. 5, 12 Stat. 15, 16; United States-Peruvian Mixed Claims Commission, Jan. 12, 1863, *ms. Record, Opinions and Awards* (1863), Order of Aug. 6, 1863; United States-French Mixed Claims Commission, Convention, Jan. 15, 1880, Art. 7,

In the *Fabiani* case between France and Venezuela under the agreement of February 24, 1891, the arbitrator, the President of the Swiss Confederation, not only required the plaintiff Government to produce certain documents, but also ordered the hearing of a number of witnesses.¹¹¹ The tribunal in the *L'Oeil de La Mer* case declared that it had the power to require supplementary evidence, to require surveys, to examine the locality, and to hear experts or witnesses. It appointed an expert to make a report on the geography of the region.¹¹² Umpire Thornton ruled in the *Pradel* case before the United States-Mexican Mixed Claims Commission of 1868 that either of the commissioners was justified in calling for documents which "may tend to throw light upon any particular case, provided that the time allowed for producing these documents does not endanger the final decision of the case before the termination of the term allowed by the convention."¹¹³

It is to be observed in these cases that when the tribunal desires further evidence it must obtain it by calling upon the parties. In some instances tribunals have been authorized to procure evidence upon their own initiative and by direct action without reference to the parties. The Franco-Haitien Arbitral Tribunal of 1923 was given the unusual power of "communicating directly with all functionaries of the Government . . . for the purpose of informing itself more fully, upon condition that it communicate to the interested parties all evidence or documents obtained." Under the

Minutes of Proceedings, pp. 47-60; French-Mexican Claims Commission, Supplementary Convention, Aug. 2, 1930, Art. VI, *Memoria de la Secretaria de Relaciones Exteriores*, 1929-1930. (Mexico, 1930), vol. I, p. 36.

It is customarily provided of course, in acts of Congress creating domestic claims commissions, that all records, papers, documents, etc. in the possession of the Department of State shall be transmitted or made available to the commissions.

See also *supra*, p. 82.

¹¹¹ *Jugement arbitral rendu par la Président de la confédération suisse le 30 décembre 1896* (Genève) 21.

See *Kemeny v. Etat serbe-croat-slovene* (Hungarian-Serb-Croat-Slovene Mixed Arbitral Tribunal) 6 *Recueil des décisions* 510 (1926).

¹¹² *VIII Rev. de droit int. et de leg. comp. 2d Series* (1906) 162, 166.

¹¹³ *VII ms. Opinions* 478.

"To provide themselves with all the information and data which might contribute to the enlightening of their judgments and the formation of their legal opinions, is a prerogative properly belonging to every judge, and those conducting this arbitration, have made use of it without stint. . . .

"Whenever the Commission has discovered an important fact, but not sufficiently proven, and also perceived that it would be easy to obtain the proof of it, it has requested the claimant or the government against which claim was made, or both at the same time, to furnish it with the desired papers." *Pradel* case, Opinion of Commissioner Zamacoma, *ibid.* 108.

For further cases, see *Colombian-Venezuelan Boundary Arbitration*, Nov. 3, 1916, *Sentence preparatoire*, etc. (Neuchatel, 1918) 4; *Grisbadarna* case (Norway v. Sweden), March 14, 1908, *Recueil des comptes rendus de la visite des lieux et de Protocoles des Séances du Tribunal arbitral*, etc. (The Hague, 1909) 2; *Salvador Commercial Co. case* (United States v. Salvador), Dec. 19, 1901, *Proceedings of the Commission*, Shorthand report, National Archives of United States, book 2, pp. 1-4.

rules of procedure of the Spanish Treaty Claims Commission, it could summon witnesses of its own motion.¹¹⁴

Under the procedure of the Permanent Court of International Justice with respect to Advisory Opinions, it is the practice for the Registrar to obtain on his own initiative, or under the direction of the Court, any documentary information in addition to that submitted with the pleadings which appears to be necessary to a full understanding of the questions presented for the Court's opinions. It has been the duty of the Registrar in particular to ensure that all documents referred to either directly or indirectly in the instruments of procedure were at the disposal of the Court. However "the Court has recognized that the documents submitted to it as annexes to a request for an advisory opinion must establish the facts in a sufficiently clear manner, and that the Court is not called upon to undertake inquiries in order to supplement the statement of facts laid before it."¹¹⁵ Consequently, it refused in the *Eastern Carelia* case to give an advisory opinion on the question whether Finland and Russia in the Treaty of Dorpat, October 14, 1920, contracted as to the nature of the autonomy of Eastern Carelia, saying that the question was really one of fact. As Russia refused to participate, the Court pointed out it would be at a very great disadvantage in an enquiry as to the facts, and added:

"The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some inquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are."¹¹⁶

Thus, although the Court is willing to supplement on its own initiative the information furnished by the interested parties, it will not undertake primary responsibility for obtaining evidence required to resolve a decisive question of fact.

Broader power has been conferred upon the Permanent Court to require the production of further evidence than is usually the

¹¹⁴ Franco-Haitien Arbitral Tribunal, Aug. 11, 1923, Rules of Procedure, Art. 15, *Bulletin officiel du Département des relations extérieures*, Oct.-Nov., 1926, p. 15; Spanish Treaty Claims Commission, Act of March 2, 1901, Rules of Procedure No. 11, *Documents and Opinions to June 13, 1903*, (Washington, 1903) 4; Commission des Réclamations (Haiti), 1919, Rules of Procedure, Arts. 19, 22, Mimeograph copy, Dept. of State.

¹¹⁵ Series D, No. 2 (3d add.), p. 838. For examples of documents obtained by the Registrar, see Series B, No. 1, p. 11 (*Workers' Delegate for the Netherlands*); Series C, No. 5-II, p. 65 (*Question of the Monastery of Saint Naoum*); Series C, No. 16-I, p. 240 (*Denunciation of the Treaty of Nov. 2, 1865, between China and Belgium*); Series C, No. 18-I, pp. 391, 1008 (*Greco-Bulgarian Communities*); Series C, No. 57, p. 374 (*Interpretation of the Greco-Bulgarian Agreement of Dec. 9, 1927*).

¹¹⁶ Series B, No. 5, p. 28.

case with *ad hoc* tribunals. By the Statute, it is authorized in Article 49 "even before the hearing begins" to "call upon the Agents to produce any document or to supply any explanation," and to "take formal note of any refusal" to comply. Under Article 50, the Court "may at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion." In pursuance of this authority provision has been made in Article 54 of the Rules for the Court to invite the parties to call witnesses, and under Article 56 the Court has discretion to take the initiative in taking "the necessary steps for the examination of witnesses or experts otherwise than before the Court itself."

The Court has exercised the power to require the production of further documentary evidence in numerous instances.¹¹⁷ On one occasion witnesses were heard on its request, and on one occasion it instituted an expert inquiry which was terminated before a report was completed because of the settlement of the dispute by agreement.¹¹⁸ However, the Court has refused to request the production of evidence "going outside the terms of the dispute and raising a question of law not referred to it by the Parties."¹¹⁹

It may be queried whether international tribunals should not be given wider authority to obtain on their own initiative evidence and information concerning questions submitted to them. They are not at present equipped to undertake such a task, but that deficiency could be overcome by attaching an agent to the tribunal whose function it would be to undertake any researches or to take any steps in obtaining further evidence which the exigencies of the case might require.¹²⁰ The Registrar of the Permanent Court at present performs this function to a very limited extent. He has done enough to indicate the possibilities of such an office endowed with wide powers. Any evidence obtained in such manner would of course have to be communicated to the parties, and an opportunity given them to comment on it, or to offer further evidence

¹¹⁷ Series A, No. 17, p. 18 (*Factory at Chorzow* case); Series C, No. 15-II, pp. 504ff. (*Factory at Chorzow, Claim for Indemnity*); Series C, No. 67, pp. 4012-4073 (*Legal Status of Eastern Greenland*).

¹¹⁸ *German Interests in Polish Upper Silesia*, Order of March 22, 1926, Series A, No. 7, p. 96. See also Series C, No. 11-I, pp. 27-28, 31, 317-338. See *infra*, pp. 221-222.

Chorzow Factory case, Series A, No. 17, pp. 99-103; Series C, No. 16-II, pp. 12, 14, 17-24; Series A, No. 18/19, p. 14. See *infra*, pp. 222, 238-240.

The consent of the court to the production of a witness by a party does not seem to be necessary. Series D, No. 2, pp. 142-143.

¹¹⁹ Series E, No. 3, p. 212.

¹²⁰ Technical assessors are provided for in Articles 26 and 27 of the Statute of the Permanent Court of International Justice to act as assistants to the judges of the special chambers provided for Labor and Transit, and Communications cases. Apparently they were intended to perform a function analogous to that suggested in the text. This procedure appears never to have been resorted to. Series D, No. 1 (3d ed.) 17-18.

in relation to it. In the case of *ad hoc* tribunals, the principal difficulty would consist in obtaining an impartial person for this office, but this could be met probably by selecting a competent jurist from a third state, as is done in the case of umpires or of the odd member of a tribunal in addition to the national members. The settlement of disputes in international law is distinctly a matter of public interest and is not simply in the nature of a private contest between parties. There appears to be no good reason for not recognizing the general public interest in the settlement of international disputes by thus endowing tribunals with power to conduct investigations necessary to insure that cases submitted to them are decided as nearly on the basis of the facts as is possible.

Section 33. To Remove Evidence From the Record. Removing from the record of the proceedings evidence which has already been produced and filed, either by permitting its withdrawal or striking it out, is a serious action and one not frequently taken by international tribunals. The usual practice is to leave the evidence in the record, the tribunal being free to disregard it, or to give it whatever weight deemed by the tribunal to be proper in the light of the pleadings and the other evidence.¹²¹

However, in the exercise of their power to adopt rules to govern procedure before them, tribunals have occasionally adopted rules or entered orders providing that certain evidence might be stricken from the record.

The rules of the United States-Venezuelan Mixed Claims Commission of 1885, and of the United States-Chilean Commission of 1892 provided that "any testimony or matter" that was "improper, irrelevant, immaterial or scandalous" should, on motion, be "stricken from the record."¹²² The United States-French Mixed Claims Commission of 1880 ruled that it would "not allow scandalous evidence to finally appear as part of the record, or indeed any language injurious to either Government, for they deem it their duty to require that both Governments must be treated with the utmost courtesy and respect."¹²³ Commissioner Wadsworth in his opinion in the *Latham* case, before the United States-Mexican

¹²¹ For example, the arbitrator declared in his award in the *May* case (United States v. Guatemala), Feb. 23, 1900: ". . . I wish to state that I regret the insertion in the evidence of the Guatemalan Government of a series of accusations against Mr. May and his staff that are entirely unsupported by trustworthy evidence." 1900 For. Rel. 656, 661.

¹²² United States-Venezuelan, Rules, Art. XIV, III Moore's *Arbitrations* 2228; United States-Chilean, Rules, Art. XIV, *ibid.* 2234. Acting under a similar rule, the United States-Chilean Commission of 1897 refused to allow the claimant to file an extract from a newspaper containing objectionable "strictures" upon the respondent Government. *Leach* case, *Minutes of the Commission* (1901) 69.

¹²³ *Minutes of the Proceedings*, p. 486. Its rules contained in Article XIV a provision similar to those of the Venezuelan and Chilean Commissions. III Moore's *Arbitrations* 2215.

Mixed Claims Commission of 1868, took a similar position, saying that "the foolish and scandalous papers filed by Mr. Howell . . . should be stricken from the files," and that he "certainly never would have consented to receive them" if he "had been acquainted with their contents."¹²⁴ From the views expressed by the members of the Permanent Court of International Justice concerning the responsibility of parties for evidence produced, it seems likely that the Court would remove such evidence from its records should the occasion arise.¹²⁵ It has declined to admit confidential documents submitted with the pleadings.¹²⁶

The United States-French Commission also struck from its records evidence filed after the period fixed by the rules and without leave granted by the Commission, and evidence introduced in a case which had been ordered stricken from the record of another case.¹²⁷

Tribunals will disregard evidence shown to be forged or to contain perjured testimony, although, in general, they have no authority to punish the persons forging or swearing to the false documents.¹²⁸ In cases in which such evidence has been considered the practice appears to have been to examine it and to draw against the party using it whatever inferences appeared warranted by its importance in the case, but not to strike it from the record.¹²⁹ In the *Leggett* case, the Board of Commissioners of 1849 concluded that certain decisive evidence produced by Mexico when Leggett had presented a claim to the United States-Mexican Commission of 1839, was "grossly false and spurious," and that it had apparently been relied upon by the Umpire in reducing the amount of his award. The Commission held that it could not "revise the proceedings or opinion of the Umpire," but that it could allow damages to the claimant for the losses suffered by him through the use of the spurious documents.¹³⁰ Frequent complaints were made by the United States-Mexican Commission of 1868 concerning the fraudulent character of documentary evidence produced in support

¹²⁴ IV ms. *Opinions* 103-104. The claim was dismissed by Umpire Thornton, VII ms. *Opinions* 357, 359.

¹²⁵ See *supra*, sec. 28.

¹²⁶ For a full discussion of the treatment of confidential documents, see *infra*, sec. 88.

¹²⁷ *Rault*, and *Bouron* cases, *Minutes of the Proceedings*, pp. 545-546; *Valade* case, *ibid.* 804. See decision in the case of *Schooner "Delight"* (United States Court of Claims), *Opinions in French Spoliation Cases* (1912) 77-78, overruling a motion by the Government to strike out certain evidence as "inadmissible."

¹²⁸ See *infra*, sec. 70.

¹²⁹ In the *Fur Seal* case, Feb. 29, 1892, the United States having discovered that a number of copies in translation of official documents from the Russian Archives had been forged, notified the British Government and withdrew them. I Moore's *Arbitrations* 814-816.

¹³⁰ Ms. *Opinions*, 1849, vol. 2, pp. 852-872.

of claims presented to it, and it penalized claimants according to their apparent or established guilty knowledge of its use.¹³¹

It would seem that, on principle, with the consent of the other party and the sanction of the tribunal, a party should be allowed to withdraw a document which has been produced. During the proceedings in the *Mavrommatis* case before the Permanent Court of International Justice, the President informed the Court that the agents of the parties had manifested a desire to withdraw from the record certain documents and to suppress certain passages in others and in the text of the pleadings. The Court "took due note of these declarations and requested the agents of the Parties to inform the Registrar of the changes to be made in the documents in question."¹³² Upon objection by one of the parties, the tribunal may refuse to permit withdrawal of a document already in the record.¹³³

¹³¹ See especially sec. 103, *infra*, and see *de Lespes* case, Opinion of Commissioner Palacio, II ms. *Opinions* 429, 431; *Woodhouse* case, Opinion of Commissioner Zamacoma, V ms. *Opinions* 272-273.

"There is scarcely room for a doubt as to the conclusion we reach, that all these expedientes each and every one, is from beginning to end a forgery. Certainly not one of them is entitled to the least credit, nor can we give to them any weight whatever as evidence of the pretended facts which they detail. Their statements are incredible lies, in the first place, which no reputable witness could swear to, or any honest Judge at Piedras Negras certify, for there each and every person would know at once their false and fraudulent character.

"According to the testimony in these cases, introduced by the United States, coming from citizens of both countries; sometimes occupying official positions, sometimes the pretended claimants and witnesses produced in the fraudulent expedientes, the active agents in the crimes committed in the preparation of these cases are identified in a conclusive manner.

"We present to the notice of both governments, as the persons responsible for these frauds and forgeries, Luis Musquiz, and Abram (or Abraham) Jiminez, William Stone and Bethel Coopwood, the latter in the Territory of Columbia, and city of Washington, having sworn to a number of the Memorials, is believed amenable to the laws of the United States, the others perhaps only to the laws of Mexico.

"But the governments will fail in their duty to each other, and to their own citizens, unless they order an investigation, to be followed by the arrest, trial and punishment of the guilty parties." *Tauns* case, and "*Piedras Negras*" *Claims* case, Commissioner Wadsworth for the Commission, II ms. *Opinions* 505, 513-514.

¹³² Series E, No. 3, p. 205; No. 6, p. 290.

¹³³ During the oral proceedings in the *Venezuelan Preferential* case, upon Sir Robert Finlay's having demanded that Mr. Penfield, Agent of the United States, communicate to the other Parties copies of a document he had just read, and which had not been produced previously, Mr. Penfield maintained he had not produced the document as evidence but only as part of his argument and offered to withdraw it. Sir Robert contended it was too late, and the Tribunal held that "according to the rules of the Hague Convention every document produced with whatever object by one of the Parties must be communicated to all the others." *Recueil des Actes et Protocoles*, etc. (The Hague, 1904) 88.

In the United States-Spanish Mixed Claims Commission of 1871, the American and Spanish arbitrators disagreed on a motion by the United States in the *Govin y Pinto*, No. 9, *Jose Govin*, No. 38, and *Martinez*, No. 135 cases that certain records of the Junta Central Republicana de Cuba y Puerto Rico

Section 34. To Make Evidence Accessible to Third Parties and to the Public. With the exception of the Permanent Court of International Justice, the sessions of arbitral tribunals have not as a rule been open to the public. The Hague Convention of 1907 provided in Article 66 that discussions of tribunals established under the Convention should only be "public if it be so decided by the tribunal, with the assent of the parties." Written pleadings, as well as discussions and hearings, were regarded as confidential under this procedure and were not made accessible by the tribunal either to the public or to third parties. The publicity given to the proceedings after the decision was a matter subject to the control of the parties. In the case of claims commissions a record of motions, orders, decisions, opinions, etc., have sometimes been printed during the proceedings for the benefit of the commission and the parties, but made public only with the consent of, or by, the parties.

In drafting the Statute of the Permanent Court of International Justice, it was determined to reverse this practice of secrecy, and it was accordingly provided in Article 46 that "the hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted."¹³⁴ Hudson says that "in practice, hearings before the Court are invariably public."¹³⁵

Before the opening of the hearings, however, the documents of the pleadings, may be made public only after agreement between the parties of which the Court has been duly informed.¹³⁶ Under Article 44 of the Rules, the Court, or the President, if the Court is not sitting, "may after hearing the parties, order the Registrar to hold the cases and counter-cases of each suit at the disposal of the Government of any Member of the League of Nations or State which is entitled to appear before the Court." This Rule was

be withdrawn from the record. Opinions of the Arbitrators of Spain and the United States, June 4, 1881, *Record* (1871), vol. 16. The Umpire held the books to be competent evidence and took them into account in making certain awards. See *supra*, p. 10, note 19.

Art. 436 of the German Code of Civil Procedure of 1933 provides that after a party has produced a document it may not withdraw it without the consent of the other party.

¹³⁴ For an account of the discussion of this rule in the Third Committee of the Assembly, see Hudson, *Permanent Court*, pp. 171-172.

The Report of the Advisory Committee of Jurists which drafted the Statute of the Court declared that the custom of secrecy, obtaining in the practice of the Permanent Court of Arbitration, had been reversed "since both the frankness required between members of the League of Nations and the publicity of a Court of Justice demand it." *Procès Verbaux*, *op. cit.* 738.

¹³⁵ *Permanent Court*, p. 172.

¹³⁶ Series E, No. 6, p. 284. The Court pointed out that even in that case "there might undoubtedly be serious objections to a public discussion of documents presented by governments in a suit pending before the Court." See also Series C, No. 16—III, pp. 776, 777, 781, 789; Series E, No. 7, pp. 280-281.

adopted primarily to give to States not parties to the case an opportunity to examine the written proceedings with a view to determining whether it desires to take the necessary steps to intervene under Articles 62 and 63 of the Statute.¹³⁷ In the case of *Minority Schools in Albania*, upon receiving a request from a State not concerned in the case, invoking Article 44, and asking to be supplied with copies of the written proceedings, the Court ruled:

" . . . the object of the Article was to provide for the possibility of the parties requesting—as they were entitled to do under the statute—that the oral proceedings should not be public, in which case documents of the written proceedings must not be made public before the delivery of judgment; but when the oral proceedings, had already taken place in public, the communication of these documents became a purely administrative question."

Although the consent of the parties was not deemed necessary, they were communicated with before complying with the request.¹³⁸ It is to be noted from this decision that, in the event of secret hearings, the records are not made public until after the judgment has been rendered.

In another instance, a Government requested to be supplied with copies of the written proceedings for examination in connection with a dispute between it and another government. The Court decided "that if the Parties agreed to the communication of the documents of the written proceedings to the government in question, the Registrar might supply them," but he was "to inform the diplomatic representative of the other government concerned in the dispute mentioned . . . that the documents were also at his disposal."¹³⁹

The Court, or the President may, in the same way, with the consent of the parties, authorize the documents of the written proceedings in regard to a particular case to be made accessible to the public before the termination of the case.¹⁴⁰

The procedure described is, in general, applicable also to the pleadings in advisory cases. However, in such cases it is the practice in accordance with Articles 44 and 82 of the Rules to communicate to interested Governments the written statements submitted

¹³⁷ For provisions and rules concerning intervention, see Arts. 64-66.

¹³⁸ Series E, No. 11, p. 148. See also Series E, No. 8, p. 262; No. 9, p. 169. Several Governments having expressed a wish to see the documents of the written proceedings in pending cases, the Court, with the consent of the Parties, gave a general authorization in this respect under Art. 42. Series E, No. 5, p. 253.

¹³⁹ Series E, No. 9, p. 169.

¹⁴⁰ Rules (1936) Art. 44, par. 3. The Court obtained the consent of the parties to such publicity in the *Legal Status of Eastern Greenland* case, and supplied documents of the proceedings to a person interested in the case for scientific reasons. Series E, No. 9, pp. 169-170. See also Series E, No. 7, pp. 282-283.

to the Court.¹⁴¹ At the termination of the case a complete record of the proceedings, written and oral, including the evidence produced, is published under the direction of the Registry of the Court. All documents produced are usually included in the publication.¹⁴² The verbatim record of the oral evidence, which is made subject to the right of the witness to make corrections, is published as corrected and signed by the witness.¹⁴³ Such complete and immediate publicity with respect to all evidence produced, in effect, serves as a potent influence impelling parties to a high standard of conduct in the integrity and quality of the evidence which they produce, and merits general adoption in international judicial proceedings.

Section 35. Judgment on a Prima Facie Case.¹⁴⁴ Municipal tribunals do not hesitate to give judgment in favor of the plaintiff if the defendant, after being duly notified of the initiation of the proceedings, fails to put in an appearance, or if, having appeared, he fails to submit evidence in answer to the case established by the plaintiff. It is considered only fair and just that the plaintiff should not be made to suffer because of the negligent failure of the respondent to enter a defense, or his deliberate refusal to appear. From his silence, the law presumes the validity of the plaintiff's claims. However, the willingness of these tribunals to take such action must be viewed in the light of the fact that the availability of appeal to a higher court in cases of any importance serves as an effective guarantee against miscarriage of justice.

International tribunals must necessarily proceed with greater caution. In dealing with sovereign states rather than with individuals, it can not lightly be presumed that one of the parties to the litigation is guilty of negligence or of *mala fides* in the prosecution of a case before an international tribunal. "It must generally be assumed," says Commissioner Nielsen speaking for the United States-Mexican General Claims Commission in the *Kling* case, "that any available proof tending to support a Government's contention will be produced."¹⁴⁵ He comments further: "Counsel in an international arbitration are of course zealous in producing all possible evidence and argument in defense of the acts of a government which they represent." Unfortunately, in international judicial pro-

¹⁴¹ See Series E, No. 8, p. 262; Series C, No. 53, pp. 712, 717-718, 722. The analogous provision in the 1931 Rules is Art. 73.

¹⁴² Series E, No. 3, p. 209; No. 9, p. 168. See also Series E, No. 8, p. 260.

¹⁴³ Cf. sec. 74. Hudson says "it is doubtful whether any other judicial institution publishes such a complete record of its activities." *Permanent Court*, p. 295.

¹⁴⁴ See *supra*, pp. 102-104.

¹⁴⁵ *Opinions* (1931) 36, 46.

"... it is to be assumed that each side will in any event in cases of this nature produce all the evidence attainable." Davis, J., in *Schooner "Delight"* case, before the Court of Claims, *Opinions in French Spoliation Cases* (1912) 72, 78.

ceedings, as in municipal, this is an ideal which counsel do not always attain. Consequently, instances occur in which tribunals are called upon to pass on cases in which counsel for the respondent have submitted little or no evidence. This situation is not likely to occur, however, before tribunals other than claims commissions.

"But the mere fact that such evidence produced by the respondent government is meagre," declares the United States-Mexican General Claims Commission in its opinion in the *Costello* case, "can not in itself justify an award in the absence of concrete and convincing evidence produced by the claimant Government."¹⁴⁶ This would appear to represent a sound rule for the guidance of tribunals in dealing with cases in which the plaintiff Government has failed to substantiate its claim, in the face of the submission of inadequate evidence by the respondent Government. Applying this rule in the *Melcer Mining Co.* case, the Commission refused to award the amount claimed for the seizure of its pipe line, the evidence as to value produced by the United States being "altogether too uncertain," although it was asserted that it could be presumed from the failure of the Mexican Government to submit evidence as to value that such evidence if produced would not have refuted the claimant's charge. An award of \$15,000 was made, the claimant having alleged damages of \$393,883.00.¹⁴⁷ It would seem clear on principle that a case should be dismissed when the claimant fails to substantiate the allegations of his pleadings even if no evidence is submitted by the other party.¹⁴⁸

¹⁴⁶ *Opinions* (1929) 264. The Government of the United States contended in its argument in the *Turner* case before the United States-British Mixed Claims Commission of 1871 that "a claimant before the Commission must at least so far conform to the ordinary rules of pleading and of evidence as to state in her memorial facts entitling her to recover against the United States and to sustain such allegations by proof." It asserted further "that on uncertain, insufficient, and ambiguous statements, by way of pleading or evidence, such as leave open the question whether the claimant may or may not be entitled to recover, the United States are not put upon their defense, and cannot be called on to rebut the possible inference that the claimant may be entitled to recover." "Argument for the United States," No. 34, *Memorials, Demurrers, etc.* (1871), vol. 3.

¹⁴⁷ *Opinions* (1928-1929) 234.

¹⁴⁸ *Godfrey* case (Board of Commissioners, Act of March 3, 1849), ms. *Opinions*, 1849, vol. 2, pp. 574-577; *Clark* case (United States v. Mexico), July 4, 1868, II ms. *Opinions* 476, 486-487; *Goodrich* (Driggs) case (United States v. Venezuela), Dec. 5, 1885, *Opinions in Principal Cases* (1890) 71-72; *Salvador Cerda v. Govt. of Costa Rica*, Central American Court of Justice, Decision of Oct. 14, 1911, I *Anales* 204. See *Petit and Co. v. Les Mines Fiscales de Westphalie* (German-Belgian Mixed Arbitral Tribunal) 2 *Recueil des décisions* 544 (1922); *Merkel v. Givandan, Lavirotte and Co.* (Franco-German Mixed Arbitral Tribunal), *ibid.* 330; *Beyer v. Flersheim-Hess* (Franco-German Mixed Arbitral Tribunal), 2 *Recueil des décisions* 914 (1923).

"This document [submitted as evidence of a loan of \$15,580. 16½ upon which claim for indemnity was made] which is in the form of a simple contract, was not executed before a notary, and appears witnessed only by Guillermo Vega and Manuel Castro, who have not been examined.

"The signature of Placido Vega at the foot of the document was not acknowledged by him. The claimants have made an endeavor to remedy this

On the other hand, when the claimant Government has submitted evidence "which unexplained or uncontradicted, is sufficient to maintain the proposition affirmed,"¹⁴⁹ its case will not be permitted to suffer through the non-production of evidence by the defendant, even though such evidence might have further elucidated facts in issue.¹⁵⁰ Thus, in the *Plehn* case the German-Mexican Commission of 1925 awarded \$20,000.00 to the claimant Government, saying that the absence of the record of the proceedings taken for the punishment of the bandits who killed the claimant's husband could not "damage the claimant, as it was not in her hands to present and appertained to the defendant agency to show it in proof of its assertion that there was no lenity or lack of diligence on the part of the authorities."¹⁵¹ If the facts stated by the claimant Government are substantiated only by partial proof, judgment in its favor has been held warranted when the respondent Government could easily have rebutted such statements, if untrue, by submitting evidence within its control.¹⁵²

defect by calling upon Mr. Joseph W. Hale, who in his affidavit No. 16, states the said signature of Vega is true and genuine.

"The whole of the evidence of the claim thus consists of a private document the signature to which has never been acknowledged by the party by whom it appears to have been executed, and the genuineness of which is only proved by the statement of a single voluntary witness, who deposed without notification to, and behind the other party's back. In no court of law would an order be granted, directing payment to be made, upon evidence so defective. It would be strange if an international tribunal was less strict, where the parties interested are friendly nations and on neither of which responsibilities should be thrown which are not fully proved." *Widman and Brothers case* (United States v. Mexico), July 4, 1868, Opinion of Commissioner Zamacoma, IV ms. *Opinions* 113, 114-115. Umpire Thornton dismissed the Claim. *Ibid.*, vol. VII, pp. 359-361.

¹⁴⁹ 23 Corpus Juris 9, defining the term *prima facie* evidence.

¹⁵⁰ *Kalklosch case* (United States v. Mexico), Sept. 8, 1923, *Opinions* (1928-1929) 126, 130; *Kling case*, *ibid.*, *Opinions* (1931) 36, 49; *Wenckler case* (United States v. Mexico), July 4, 1868, IV ms. *Opinions* 603; *Schreck case*, *ibid.*, IV ms. *Opinions* 623, 624; *Lake case*, *ibid.*, I ms. *Opinions* 138, 140; *Belden case*, *ibid.* 382, 403; *Johnson case* (United States v. Peru), Dec. 4, 1868, ms. *Proceedings and Awards* (1868) 387, 406; *William S. Parrot case* (United States v. Mexico), April 11, 1839, ms. *Minutes of Proceedings* (1839), vol. III, pp. 25-27, 30-35; same case, ms. *Opinions*, 1849, vol. III, pp. 1001-1003, 1016-1018. But see the *Alsop and Co. case*, No. 2 (United States v. Peru), July 17, 1863, ms. *Record, Opinions and Awards* (1863) 61; ms. *Proceedings* (1863) 58. See also *supra*, pp. 81, 104.

The Hungarian-Serb-Croat-Slovene Mixed Arbitral Tribunal in refusing in the case of *Compagnie pour la construction du chemin de fer d'Ogulin a la frontiere, S.A. v. Etat Serb-Croat-Slovene* to require "absolute proof" of ownership of the property in question observed that "such *probatio diabolica* is generally impossible to obtain." 6 *Recueil des décisions* 505, 509 (1926).

¹⁵¹ Quoted from the opinion in the *Kling case*, *Opinions* (1931) 46. See also Feller, *Mexican Commissions*, p. 263.

¹⁵² *Maxan case* (United States v. Mexico), July 4, 1868, VII ms. *Opinions* 395, 396; *De Lemos case* (Gt. Britain v. Venezuela), Feb. 13, 1903, Ralston's Report (1904) 302, 319, 322; *Brun case* (France v. Venezuela), French-Venezuelan Mixed Claims Commission of 1902, Ralston's Report (1906) 25; *Hatton case* (United States v. Mexico), Sept. 8, 1923, *Opinions* (1929) 6-10. See also *Alsop case* (United States v. Chile), Dec. 1, 1909, *Award* (1911) 31; *Janin v. Etat allemand* (Franco-German Mixed Arbitral Tribunal) 1 *Recueil des décisions* 774 (1922).

Section 36. Judgment by Default. Giving judgment by default against a state on account of its failure to appear before the tribunal is a more serious matter than making an award to one party on the basis of a *prima facie* case opposed only by meagre evidence on behalf of the other party. The possibility of such action appears to have been contemplated in arbitral agreements in but a few instances.¹⁵³ The rules of the Mixed Arbitral Tribunals appear in some instances to have contemplated a judgment in the event of the failure of a party to appear.¹⁵⁴ The agreement of April 20, 1910, between Italy and Peru, submitting the *Canevaro* case to arbitration, provided that "should said documents, proofs, or briefs not be presented within this period, an arbitral sentence shall be passed as if the same did not exist."¹⁵⁵ In Article IV of the Treaty of Ghent of December 24, 1814, between the United States and Great Britain, submitting to arbitration the question of the boundary in the Bay of Fundy, provision was made for a determination first by two commissioners, and in the event of their disagreement, or the reference of the case to "some friendly sovereign or state," on the basis of the reports of the commissioners, or on the report of one commissioner together with the grounds upon which the other commissioner shall "have refused, declined or omitted to act. . . ." The Article concluded:

"And if the Commissioner so refusing, declining or omitting to act, shall also wilfully omit to state the grounds upon which he has so done, in such manner that the said statement may be referred to such friendly sovereign or State, together with the report of such other Commissioner, then such sovereign or State shall decide *ex parte* upon the said report alone. And His Britannic Majesty and the Government of the United States engage to consider the decision of such friendly sovereign or State to be final and conclusive on all the matters so referred."¹⁵⁶

¹⁵³ Convention for the Establishment of a Central American Court of Justice, Art. XV, Appendix V; Prize Court Convention of 1907, Art. 40, 2 A.J.I.L., Supp. 192 (1908).

¹⁵⁴ See Franco-German Rules, Art. 73, 1 *Recueil des décisions* 54; Austrian-Belgian Rules, Art. 70, *ibid.* 180. For cases invoking such rules, see *Bumillier v. Etat allemand* (Franco-German Tribunal) 3 *Recueil des décisions* 389, 390 (1923); *Schreider v. Metenett* (Franco-German Tribunal) 2 *Recueil des décisions* 334 (1922); *Deutsch-Sudanerikamsche Bank et Office allemand v. Vaquin et Schwertzer et Office français* (Franco-German Tribunal) 8 *Recueil des décisions* 140 (1928).

¹⁵⁵ *Protocoles des Séances et Sentence* (The Hague, 1912) 6. For similar provisions, see *Alsop* case (United States v. Chile), Dec. 1, 1909, 3 *Treaties, Conventions*, etc. (Redmond, 1923) 2508; *Yuille, Shortridge and Co.* case (Gt. Britain v. Portugal), March 8, 1861, Sec. 3, Lapradelle and Politis, *Recueil*, vol. 2, p. 89.

¹⁵⁶ 1 Malloy's *Treaties* 615. For further provisions contemplating what amounted in effect to judgment by default, see Art. 6 (m) of the Protocol of April 24, 1934, between the United States and Mexico, 4 *Treaties, Conventions*, etc. (1923-1937) 4493-4494; Art. XVII, Rules of Procedure, United States-

Article 53 of the Statute of the Permanent Court of International Justice accords to a party the right to "call upon the Court to decide in favour of his claim" should the other party "not appear before the Court, or . . . fail to defend his case."¹⁵⁷ The Court must, however, before doing so "not only satisfy itself that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."¹⁵⁸ This provision was apparently included in contemplation of the compulsory jurisdiction of the Court where proceedings may be initiated by application, and was intended as a sanction to give the Court a means to compel the party cited in the application to appear. It is quite unlikely that the procedure of this Article would have to be invoked against a party where a case has been submitted to the Court by Agreement.

Panamanian Joint Claims Commission, Convention of Nov. 18, 1903, *Final Report of the Joint Commission* (1920) 23.

By an agreement of April 28, 1902, signed on behalf of the claimant by the American minister at Santo Domingo, and by the Dominican Government, the claim of J. Sala and Co. was submitted to arbitration by two arbitrators, one named by the Government and one by the company. On April 16, 1904, the Tribunal decided that the Dominican Government having failed to produce its evidence as provided in the arbitral agreement, it would proceed to a judgment upon the basis of the evidence before it. An award was accordingly made in favor of the claimant for \$215,000. *Minutes of the Arbitral Tribunal*, ms. National Archives of United States.

¹⁵⁷ In cases instituted by application it is customary in the application to petition the Court "to give judgment, whether the aforementioned Government is present or absent."

¹⁵⁸ The subcommittee of the Third Committee of the Assembly of the League of Nations, during its consideration of the draft of this article recommended by the Committee of Jurists, dropped a proposed requirement that the judgment in such a case be "supported by substantial evidence." The Italian Council for Diplomatic Litigation considered these words "useless and dangerous." *Records of the First Assembly, Meetings of the Committees*, I, 370, 499.

CHAPTER IV

THE ADMISSION OF EVIDENCE

IN GENERAL

Section 37. Nature of the Rules of Admission. Whether or not by conscious purpose, the practice of international tribunals in the admission of evidence has been cut on the same pattern as the liberal system of procedure of the civil law in various countries. Anglo-American law has exerted but slight influence on the development of the practice of international tribunals in the matter of the admission of evidence. In view of the comprehensive and detailed character of Anglo-American law concerning the admissibility of evidence, and of the numerous arbitrations to which the United States and England have been parties, a different result might have been expected. It has been suggested in an earlier section of this study that the nature of the personnel of international tribunals has exercised a decisive influence in this development.¹

The radical difference in Anglo-American and in civil law rules relating to admissibility of evidence is generally attributed to the presence of the jury in the judicial system of the former and its absence in the latter.² Although a contrary view has been

¹ See *supra*, pp. 8-9.

² The difference in the two systems in this respect is striking. For example, of the five volumes of Wigmore's monumental treatise on the American law of evidence, more than four are devoted to the subject of admissibility. On the other hand, one may search in vain in civil law treatises on evidence for any section devoted to the subject of admissibility. In fact in the Anglo-American sense of the term, there are virtually no rules limiting the admission of evidence in most civil law countries. Capitant says of French law: "As a general rule, the proof of material facts is not submitted to any restriction: it can be accomplished by any means which offer themselves to the interested party and which are of a nature to induce conviction in the mind of the judge. . . . In fact, nothing is prohibited to the parties in procuring regular written proof." *Op. cit.* 348, translation. For further material relevant to this general subject, see Bodington, *op. cit.* 2; Bonnier, *op. cit.* 18; Lessona, *op. cit.* vol. I, pp. 275-276; Simeon E. Baldwin, "A German Law Suit," 19 *Yale L.J.* 78 (1909).

It may be noted that two controls which are operative in civil law procedure exercise an important limiting influence on the admissibility of evidence: (1) Limitation of evidence to specific subject matter; (2) the questioning of witnesses primarily by the judge.

suggested,³ the validity of the conclusion seems borne out by the evolution of the Anglo-American law of evidence, and the circumstances surrounding its present administration. McCormick declares that "it is safe to say that without the jury there would be no law of evidence remotely resembling the rules of admissibility which make up its content in English speaking countries today."⁴ Wigmore attributes the system of admissibility to "the purpose of saving the jurors from being misled by certain kinds of evidence" and says that "as long . . . as the jury system is retained, certain fundamentals in our rules of evidence must be retained."⁵ Le Paulle in a recent study of comparative civil procedure finds "the existence of the law of evidence" in common law countries to be "due to a great extent to the presence of a jury."⁶

If the absence of a jury accounts for the failure of restrictive rules of admission to develop in civil law procedure, it is not unreasonable to assume that the same factor has been of decisive importance in the evolution of a similar situation in international judicial procedure. Governments have been willing to trust trained jurists to admit and take for what it was worth all evidence which the parties saw fit to submit. Their attitude would undoubtedly have been different if international procedure had required the submission of questions of fact to a jury of laymen for decision. Other factors have played a part, such as, the effect of the practical problem of obtaining adequate evidence, the intermittent and *ad hoc* character of tribunals, and the direct influence of civil law judges; but the development of municipal law concerning admission of evidence points to the character of the tribunal itself as the predominant influence.

Because of the absence in international judicial procedure of restrictive rules of exclusion based upon the intrinsic relevance, competence, or materiality of the evidence, it has seemed preferable not to use the term admissibility in this study. The term admissibility is distinctly Anglo-American in origin, and has a technical significance not applicable to the broad rules of international procedure. It is significant that the term admissibility finds but very little use in describing the reception of evidence in civil law. It has seemed more appropriate, therefore, to use the term admission as descriptive of the procedure of the reception of evidence by international tribunals. What is examined under this heading, and in other parts of this study where questions of the acceptance and exclusion of evidence are considered, is primarily

³ See, for example, E. M. Morgan, "The Jury and Exclusionary Rules of Evidence," 4 U. of Chicago L. Rev. 247-258 (1937).

⁴ "Evidence," 5 *Encyclopedia of the Social Sciences* (New York, 1931) 639.

⁵ *Op. cit.*, vol. I, pp. 108, 125.

⁶ 12 Corn. L.Q.R. 32, 48 (1926-1927).

the broad question concerning what types of evidence will be considered by arbitral tribunals. International tribunals are seldom troubled with questions of reception or exclusion, based upon the intrinsic character of the evidence itself. Nevertheless, the evidence which they are generally broadly required by the Arbitral Agreement to consider is subjected by international tribunals in the procedure of the production of evidence before them to the test of certain standards and principles. It is this, broadly speaking, which is here considered under the heading of admission of evidence.

Section 38. General Principles Controlling the Admission of Evidence.⁷ In Anglo-American procedure, if evidence is challenged, the burden is upon the person offering it to show that it complies with all the rules of admissibility. In international procedure on the contrary, evidence is always admitted upon being duly presented in accordance with the time limits fixed by the tribunal, and will only be excluded upon a showing by the party challenging it of a specific grounds requiring such action. The basic principle upon which international tribunals proceed has been well stated by Mérignhac in a passage quoted in Umpire Gutierrez-Otero's opinion in the *Franqui* case before the Spanish-Venezuelan Mixed Claims Commission of 1903:

"Then the Arbitral tribunal remains free to employ, for enlightening itself, all the kinds of evidence that it deems necessary; and it will not be bound, in this regard, by any restrictions that are encountered in municipal law, especially with respect to the administration of testimonial proof."⁸

On the ground, apparently, that only the representatives of the Governments could be heard in accordance with Article II of the Protocol of April 2, 1902, the Spanish Commissioner had objected to the whole Commission hearing the testimony of General Aguilar, whom the Venezuelan Commissioner desired to call before the Commission. The Umpire held that the General should be permitted to testify, saying "that considering the broadness of the powers of the Commission . . . there is no reason for not considering included in them the right to accede to the request of one of the arbitrators, who spontaneously for his own information and that of his colleagues believes it opportune and proper that there be heard by all, and examined if it please them, a person who in his public, civil, and military character, has already given testimony in the matter under consideration."⁹

⁷ Cf. *supra*, sec. 3.

⁸ *Traité théorique et pratique de l'arbitrage international* (Paris, 1895) 269.

⁹ Ralston's Report (1904) 934-935. During the oral arguments in the *Alaskan Boundary Arbitration*, upon reference by Sir Robert Finlay to copies of a record of a conversation between Mr. Middleton and Mr. Stratford Can-

A view in accord with the rule that a specific ground for exclusion must be shown, when the right of evidence to admission is challenged, was taken by Judge Huber, Sole Arbitrator, in the *Palmas Island* case. It was contended that the "further written explanations," which might be called for by the arbitrator under Article 3 of the Special Agreement of January 23, 1925, were limited to arguments elucidating questions previously raised, and did not include documentary evidence. The Arbitrator observed that the Explanations would be "extraordinarily limited" if they "could not extend to any allegations already made and could not consist of evidence which included documents and maps," and added:

"The limitation to written explanations excludes oral procedure; but it is not to be construed as excluding documentary evidence of any kind."¹⁰

As stated by Sir Charles Russell in his argument before the Tribunal in the *Fur Seal Arbitration*, the practice of admitting evidence of all kinds without regard to "the character, the antecedents, the trustworthiness" of the witnesses, arises fundamentally from the exigencies of the situations presented, and the character of the tribunals.¹¹ The same practice of liberal admission obtains generally in claims commissions, although the application of stricter rules might be expected there because of the fact that the real parties in interest in the prosecution of the claims are private persons although the defendant is the state, and the questions involved more nearly assimilable to those arising in municipal litigation. This is due no doubt to the "exigencies of the situation" presented, consisting in the extreme difficulties encountered in many cases in obtaining adequate evidence.¹² The Umpire in the

ning concerning a treaty which the latter had signed with Russia, the President of the Tribunal, the Lord Chief Justice of England, remarked that it was "not evidence." Sir Robert Finlay assented but added that "although clearly in a court of law, a matter of this kind would not be admitted at all, yet very often in determining questions between nations a good many things are looked at as influencing the mind one way or another which would be rejected in an English Court of law, and, of course, some principle of that kind is almost inevitable." To this the President assented. *United States v. Gt. Britain*, Jan. 24, 1903, *Proceedings* (1904), vol. 6, pp. 184-185.

In an opinion in the *Dickinson* case before the United States-French Mixed Claims Commission of 1880, concerning the admission of a report by General Pillon, June 2, 1883, to the French Minister of Foreign Affairs, the American Commissioner stated, that, although he strongly objected to admitting such an *ex parte* report when the General's evidence could have been taken on deposition, he would consent to its admission under Art. V of the Convention. The relevant portion of that article provided that the Commission should "be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments." *Minutes of Proceedings* (1884) 7, 801. Concerning *ex parte* evidence, in general, see *infra*, sec. 50.

¹⁰ *Arbitral Award* (The Hague, 1928) 19-20.

¹¹ *United States v. Gt. Britain*, Feb. 29, 1892, *Proceedings* (1895), vol. XI, p. 59.

¹² The hesitation of judges to exclude evidence because of the difficulties in obtaining it is set forth at some length elsewhere in this study. See especially *supra*, sec. 5, and *infra*, secs. 53, 79.

Pinson case before the French-Mexican Mixed Claims Commission gave as a reason for the decision not to admit restrictions on the admission of evidence in that Commission the necessity for the "observance of justice" in the development of international relations. He said that after lengthy argument by the agents it had been agreed that the Commission had "the unlimited right of admitting all methods of proof that may be considered in conscience as sufficient and necessary for bringing conviction and in determining in each case its probative force without being bound by any obligatory prescriptions of whatever nature they may be."¹³

Another reason, previously mentioned,¹⁴ assigned for the right of the tribunal to admit evidence which might normally be rejected in municipal litigation is that the members of the tribunal being jurists trained in the sifting of evidence are competent to appreciate the evidence according to its intrinsic and relative value. This principle was well stated by the Spanish arbitrator in his opinion in the *Antonio Maximo Mora* case before the United States-Spanish Mixed Claims Commission of 1871:

"It may be that under the strict English-American rules of evidence which prevail in trials where a court decides questions of law and a jury decides questions of fact, and the judge prescribes what witnesses can testify, and what description of evidence can be permitted to go to the jury, these newspaper clippings might not be admitted. But this commission is not bound by such English-American rules of evidence in jury trials. The arbitrators hear and decide questions of law and fact alike. The arbitrators are competent to decide for themselves as to the amount of credibility to be given to any evidence, and are not in danger of being misled, as juries may be. This objection to the reception of newspapers to prove facts of general and public notoriety seems, so far as I can see, to grow out of a very technical, artificial, and varying rule in English and American tribunals, which excludes all evidence which can be labeled as 'hearsay.'"¹⁵

In similar vein, Justice Strong, Sole Arbitrator, declared during the course of the oral proceedings in the *Pelletier* case that all the evidence had been admitted with the understanding that when he came to decide the case he would consider none which he did not regard as legitimate evidence for the purpose of deciding the case. He added that the fact that it was admitted did not determine conclusively that he would "regard it as bearing upon the case."¹⁶

¹³ *Jurisprudence de la Commission franco-mexicaine des réclamations*, pp. 92, 95, translation.

¹⁴ See *supra*, pp. 8-9, 119.

¹⁵ *Opinion of the Arbitrator in Behalf of Spain*, Feb. 1882, *Record* (1871), vol. 16, No. 48.

¹⁶ *United States v. Haiti*, May 24, 1884, *Record of Pelletier Claim* (1885), vol. 2, p. 1292. During the oral proceedings in the *Halifax Commission*, Great

Thus, counsel for the claimants contended before the Spanish Treaty Claims Commission in their brief in the *Bolten* case concerning the admission of the records of the Executive Departments, invoking the provision in Section 8 of the Act of March 2, 1901, that all such records relating to any claims before the Commission should be furnished to it upon its order:

"The intention of Congress as shown by the above paragraph, if we are to give plain words their obvious meaning, was and is that *all papers* filed heretofore in the case shall be *considered* by this Commission and such weight given thereto as a consideration of each paper may warrant. . . .

"What the Commission should have is light—as much of it as possible. It can not be contended that it should invoke rules of law utterly inapplicable to the present case and their present jurisdiction to shut out that light . . . simply because the source whence it comes, or its means of dissemination, do not conform to principles of law which can have no possible application here."¹⁷

An interesting and important question arose in the Board of Commissioners under the Act of August 2, 1827, established to distribute the indemnity paid by Great Britain under the Convention of November 13, 1826, concerning the admission of the testimony of certain slaves. It was held by a majority of the Board in the *Dowman* case that the testimony might "with entire safety be heard by the board; examined, weighed and cautiously considered, received or rejected according to circumstances." Commissioner Pleasants added in his opinion that the testimony should be heard "as circumstantial evidence, and where it is strongly corroborated by other circumstances, allow that weight to it, to which a credible witness of a different description would be entitled."¹⁸ Commissioner Cheves, in his dissenting opinion, on the contrary, directly challenged the validity of the principle that evidence should be admitted and weighed by the judges according to its worth asserting he had "yet" to learn that testimony in itself inadmissible can [could] be rendered competent by the mental reserve of the judge who is to weigh it." He asserted that there was not a particle of independent evidence to establish the fact in controversy, and that this demonstrated "how utterly vain these secondary efforts at doing right must be in the wisest and purest hands."¹⁹ It is to be observed that the rule of inadmissibility here

Britain objected to the introduction in evidence of an unsworn paper concerning the fishing operations of certain Gloucester firms. The Tribunal admitted it upon the contention of the United States that it had a right to introduce it under the treaty "to go for what it was worth before the Commissioners." *Proceedings* (1878), vol. I, p. 68.

¹⁷ *Briefs for Claimants and the Government* (1901), vol. 5, pp. 450, 456, No. 37.

¹⁸ *Ms. Opinions*, National Archives of United States.

¹⁹ *Ibid.*

invoked against slave testimony was one derived from local law and properly held not to be applicable in international proceedings.

The Permanent Court of International Justice has construed the absence of restrictive rules in the Statute to mean that a party may generally produce any evidence as a matter of right, so long as it is produced within the time limits fixed by the Court. Evidence submitted after those time limits may only be admitted with the consent of the other party and subject to the sanction of the Court.²⁰ In practice while the Court has placed few restrictions upon the rights of the parties to produce whatever evidence they see fit, it has, upon occasion, exercised its discretionary authority to refuse to accept evidence offered.²¹

Section 39. Certain General Instances Concerning Refusal to Admit Evidence. In most instances questions concerning refusal to admit particular evidence are considered in conjunction with the discussion of the various types of evidence, but a few general instances may be touched upon briefly here. Instances of refusal to admit evidence not submitted within the time limits fixed by the tribunal have been considered previously in the discussion of the time of the presentation of evidence in Chapter II.²² Two cases before the Central American Court of Justice may be considered here, in which the admission was challenged of documents not submitted with the complaint. Article XIV of the Convention creating the Court provided that the complaint should "comprise all the points of fact and law relative to the matter and all pertinent evidence." In the case of *Honduras and Nicaragua v. Guatemala and El Salvador*, Guatemala stated in answering the telegram of the Court communicating the complaint of Honduras, which the Court had accepted without accompanying evidence "reserving the formal notification of the complaints until the evidence be produced," that it accepted the measures proposed as a matter of courtesy, but protested against the receipt of complaints in such imperfect condition. Upon receiving formal notification of the complaint without accompanying evidence, Guatemala again protested saying that it could not defend its rights "if it did not know the evidence upon which the claim is based," and that it could "not be conceived that a serious Government would institute a suit against another without possessing beforehand the evidence upon which it rests its claim." The Court accepted the complaint requesting Honduras

²⁰ See *supra*, sec. 17. During the drafting of the Rules in 1922, M. Anzilotti said "the Court had accepted the principle that any evidence produced by the parties should be admitted automatically." Series D, No. 2, p. 210. For certain limitations on this broad statement of the rule, see especially, pp. 97-109. See also discussion relating to this matter during the preparation of the 1936 Rules, Series D, No. 2 (3d add.), pp. 201-216.

²¹ See *infra*, sec. 39, and also sec. 88.

²² *Supra*, sec. 20.

to "mention by telegraph the evidence in support, without prejudice to the effective filing of the same through the proper channel." Honduras subsequently filed a large number of documents.²³ A judgment was rendered on Dec. 19, 1908, in favor of Guatemala and El Salvador.²⁴

The admission of documents not filed with the complaint was again challenged in the case of *Felipe Molina Larios v. Honduras*, but the Court held it unnecessary to decide the question as it held the complaint inadmissible on the ground that Molina Larios had not exhausted his remedies in the Courts of Honduras. Two of the Judges in separate opinions expressed the view that evidence not submitted in accordance with Article XIV should not be admitted.²⁵

In the occasional cases in which the arbitral agreement specifically limits and describes the evidence to be considered, any other evidence offered will be refused admission. Other evidence could only be admitted by the tribunal at the risk of having the parties refuse to accept the decision on the ground that it had disregarded the terms of submission.²⁶

Tribunals have occasionally been given authority, or have assumed it in their rules of procedure, to pass upon the "competency, relevance and effect" of evidence.²⁷ As a matter of normal pro-

²³ *The Defense of the Government of Guatemala before the Central American Court of Justice at Cartago* (Washington, 1908) 19, 32-42, 47-51, 80.

²⁴ Libro Rosado de El Salvador, *Sentencia de la Corte de Justicia Centro-americana en el juicio promovido por la Republica de Honduras contra las repùblicas de El Salvador y Guatemala* (San Salvador, 1908). As it was signed only by three judges, it apparently lacked validity under Article 24 of the Convention of 1907. Hudson, *Permanent Court*, p. 47.

²⁵ III *Anales* 26, 41, 29. The remaining three judges indicated it to be their view that the documents could have been accepted on later presentation.

²⁶ *Bolivian-Peruvian Boundary Arbitration*, Dec. 30, 1902, *Replica de parte de Bolivia al alegato peruano en el litigio de limites* (Buenos Aires, 1907) 8, 39-58. Objection was made by Bolivia to the submission by Peru of documents of a character other than the official royal orders, cedulas, ordinances and similar documents required by the arbitral agreement. *Pugh case* (Gt. Britain v. Panama), Oct. 15, 1932, Art. 3 ("the Arbitrator shall . . . taking into account for the establishment of such facts the evidence thereon existing in the record, [of judicial proceedings in Panama] decide *ex aequo et bono* the questions proposed in Article I of the present agreement"). *Record of Proceedings* (Typewritten copy, Dept. of State). *The Masica Incident* (Gt. Britain v. Honduras), April 4, 1914, Art. V ("but neither Government shall be entitled to put any further evidence as to the events which occurred on the 16th of June, 1910, beyond that which was given before, or taken into consideration by, the above mentioned Court of Enquiry at La Ceiba"). 10 A.J.I.L., Supp. 100 (1917). For similar cases, see pp. 37-38.

²⁷ American-Venezuelan Mixed Claims Commission, Dec. 5, 1885, Rules, Art. XV, *Opinions in Principal Cases* (1890) 7; American-Chilean Mixed Claims Commission, Aug. 7, 1892, Rules, Art. IX, *Minutes of the Commission* (1901) 25.

cedure they pass upon the effect of evidence, but competency and relevancy relate to intrinsic character, and furnish the basic principle for a considerable portion of the rules of inadmissibility in the Anglo-American law of evidence. Such a provision would seem, therefore, to give the tribunal much wider authority in the exclusion of evidence than is normally exercised. Under Article 5 of the Protocols of August 28, 1902, in the *Japanese House Tax* case, either party was given the right to file a statement of objections "to the Countercase, additional evidence, and final arguments of the other Party" if it was of the opinion that any of the documents were "irrelevant, erroneous, or not strictly limited to answering its principal Case, evidence, and arguments."²⁸

During the proceedings in the *St. Croix River Arbitration*, the testimony of John Adams, President of the United States, was taken, and a deposition of John Jay was admitted with reference to the question what river was intended as the St. Croix in the Treaty of Peace of 1783. The Agent of Great Britain objected at great length to the admission of this evidence, principally on the ground that one of the parties in interest has no right under international law to interpret the treaty of which he is a signatory. He contended "that no testimony of the Commissioners who made the Treaty of Peace at Paris in 1783" could be received by the "board to explain what was intended by that treaty, even if all those Commissioners were now alive and upon the spot for examination, much less when the only Commissioner on the part of Great Britain at Paris at that time is dead." The American Agent replied that he had not intended by this evidence "to go further than an enquiry into the facts which the Commissioners acted upon." He said further:

"This is not a question whether evidence which has no pertinence to the issue shall be delivered to the Jury—but it is a question of what weight under all the circumstances certain testimony can have on the issue. . . .

"They [the Parties] have by convention agreed that this Board shall decide upon certain doubts, which involve one very important fact [the identity of the river intended by the Treaty to be the St. Croix]. And that this Board being duly sworn shall decide the question, according to such evidence as the governments may respectively lay before it. It would then be a very extraordinary thing, if the Board shall say that evidence, however pertinent it may be, shall have no weight. And more so if it should be determined to exclude the evidence offered on either side, under the Convention referred to."²⁹

²⁸ *Recueil des Actes et Protocoles*, etc. (The Hague, 1905) 15. Both parties filed such objections.

²⁹ 1 Moore's *Adjudications* 63-66, 260-270, 370-371.

The Commission received this evidence subject to its eventual opinion on the question whether it was to be retained or rejected, and subsequently took it into consideration during its deliberations in preparing the award.³⁰

In its Answer in the *Landreau* case the Government of Peru, referring to a letter of July 18, 1877, from J. Celestin Landreau's attorney to Mr. F. W. Seward, Acting Secretary of State, submitted with the case of the United States, contended that the letter was inadmissible since it was "merely a communication between J. Celestin Landreau and the Government of the United States, never communicated to the Government of Peru."³¹ The question of the propriety of admitting the letter does not appear to have been considered by the Tribunal. Upon objection by Great Britain in the *Fishing Claims* (Group I) case before the American-British Claims Commission of 1910, to the submission by the United States of certain copies of entries in books of account in proof of payment of light duties, customs duties and other charges, the United States said in its Reply:

"It is, of course, clear that the use of evidence in proceedings before this tribunal and other international tribunals is something very different from the production of evidence before a domestic court either in Great Britain or in the United States, even though fundamental principles in relation to the weight of evidence and the methods of refuting or impeaching testimony should not be ignored in the presentation of cases to international tribunals. Proof of payments made by claimants by copies of entries made by their bookkeepers upon the return of their vessels from fishing trips is, the United States submits, a reasonable and unobjectionable method of proof conformable to the rules of the arbitration. This method has been employed when other evidence that might be considered as better evidence has not been available."³²

No account appears to have been taken of the objection by the Commission.

³⁰ *Ibid.* 262-263, 382-384.

³¹ *United States v. Peru*, May 21, 1921, *Answer of the Republic of Peru* (Washington, 1922) 35.

³² "Reply of the United States," *Pleadings and Awards* (1910), vol. 20, Nos. 45-71. In the case of "*The Sidra*" before the same commission, Great Britain acknowledged that a copy of the *Findings of the Naval Board of Investigation* concerning the collision between "*The Sidra*" and the "*Potomac*," submitted by the United States, could properly be received, "in view of the less formal method of producing proof permitted under the rules of practice." She contended at considerable length, however, that the findings and conclusions of the board were not "competent as evidence," and that "on account of the inherent nature and non-judicial character of the proceedings before such a Board, its findings and conclusions" were of "no probative value." The Commission relied in part on evidence contained in the Board's *Findings* in reaching its decision. "Reply of Gt. Britain," pp. 5-9, *ibid.*, vol. 12, No. 23, Nielsen's Report (1926) 452-458.

One or two cases of refusal by the Permanent Court of International Justice to accept certain evidence offered may be mentioned here. During the first phase of the proceedings in the *Free Zones* case, the Swiss Agent had sent to the Court "for information" a collection of documents indirectly bearing upon the case, but which were not to be regarded as annexed to any part of the written proceedings, and which were not therefore communicated to the Judges nor to the other Party. When the Swiss Agent referred to these documents during the oral proceedings, filing a copy, the Agent of France objected, maintaining that the Court should not receive them as evidence since they had not been filed in due form, saying that if they were to be admitted he would have to ask for time to reply to them in writing, and, if necessary, orally. Invoking Article 52 of the Statute, the Court by an order of August 19, 1929, decided not to receive them at that stage of the proceedings "as they were not necessary to enable the Court to form its opinion."³³ In its judgment in the same case, the Court referred to the documents submitted by the parties, and listed in the annex, "so far as they have been accepted."³⁴

In the *Mavrommatis Jerusalem Concessions* case, one of the Parties having filed certain certified documents which had not been included in the annexes to the Case, the Court, "having regard to Article 40 of the Rules," accepted them only "by a special decision . . . under Article 33 of the Rules."³⁵

In the absence of the provision of a specific ground of exclusion in the arbitral agreement, there is no rule of law which can be invoked as binding a tribunal to exclude particular evidence. In practice, as indicated by the instances described in this section, tribunals have been unwilling to exclude evidence in reliance upon general rules or principles, drawn from the practice of other tribunals or from municipal law. Admission is a matter of right, and the burden is upon the party challenging any piece of evidence to show that the particular procedural law of the tribunal will be violated by a refusal to exclude it.

PROVISIONS IN THE ARBITRAL AGREEMENT

Section 40. Evidence to be Considered. It is very generally provided in arbitral agreements that the tribunal shall be bound to receive and consider all evidence submitted to it by or on behalf of the governments parties to the proceedings. The provision generally speaks of "written documents or statements," but that is due to the fact that in a large majority of arbitrations the use of the

³³ Series E, No. 6, p. 298; Series A, No. 22, pp. 14, 21.

³⁴ Series A/B, No. 42, p. 102.

³⁵ Series E, No. 6, p. 290.

direct testimony of witnesses is not contemplated. There seems to be no doubt that there is included within the terms of the requirement any such oral evidence which may be offered in accordance with the terms of the agreement, or the record of such evidence taken on commission outside the tribunal. The wording of the clause also varies with reference to the obligation imposed, including such terms as "bound to receive and peruse," "after perusing the documents which they may present," "receive and examine," "take into consideration." The nature of the obligation, and its inclusiveness appear, nevertheless, to be the same in all instances.³⁶ A provision which, on its face, allowed the tribunal more discretion than do agreements of the foregoing type is that contained in Article III of the Anglo-Chilean Convention of September 26, 1893, to the effect that the Tribunal should "resort to the means of proof or of investigation that according to the judgment and right discernment of its members will [would] conduce to the better clarification of the facts controverted and especially to the determination of the status and neutral character of the claimant."³⁷

A variation from the provision imposing an affirmative obligation on the tribunal may be found in some agreements establishing claims commissions, in which the right is conferred upon the respective Governments to offer to the commission "any documents, affidavits, interrogatories, or other evidence," the wording, of course, varying from case to case. In these cases, the commissions have usually provided in their rules of procedure that they would accept any such evidence submitted by the parties.³⁸ Provisions of

³⁶ *Northeastern Boundary Arbitration* (United States v. Gt. Britain) Dec. 24, 1814, Art. IV, 1 Malloy's *Treaties* 614; United States-British Mixed Claims Commission, Feb. 8, 1853, Art. II, 1 Malloy's *Treaties* 664, 666; *Schooner "Mermaid"* case (Gt. Britain v. Spain), March 4, 1868, Art. 3, Lapradelle and Politis, *Recueil*, vol. II, p. 494; United States-British Mixed Claims Commission, May 8, 1871, Art. XIII, 1 Malloy's *Treaties* 706; *Costa Rican-Colombian Boundary Arbitration*, Dec. 25, 1880, Art. IV, W. R. Manning, *Arbitration Treaties Among the American Nations* (New York, 1924) 120; United States-Venezuelan Mixed Claims Commission, Feb. 17, 1903, see Ralston's Report (1904) 1, 2-3. [For provisions substantially similar in the Protocols establishing the other Venezuelan Mixed Claims Commissions of 1903, see Ralston's Report (1904) 262-263 (Belgian), 294-295 (British), 483-484 (French), 511, 515-517 (German), 643, 645-646 (Italian), 875, 876 (Mexican), 889, 891 (Netherlands), 917, 919 (Spanish), 945, 947 (Swedish and Norwegian)]; Franco-Haitien Mixed Claims Commission, Sept. 10, 1913, Martens, *Nouveau recueil général de traités*, vol. 104, p. 345 (3d Series); *Tacna-Arica Boundary Arbitration* (Chile v. Peru), July 20, 1922, Art. 2, *Case of Chile*, Appendix, p. 699; Tripartite Claims Commission (United States v. Austria and Hungary), Dec. 12, 1925, Rules, Art. VIII (a), Parker's Report (1933) 178; Austrian-Belgian Mixed Arbitral Tribunal, Rules, Art. 48, 1 *Recueil des décisions* 177. For similar provision in the rules of certain other of the Mixed Arbitral Tribunals, see *Recueil des décisions*, vol. 1, *passim*.

³⁷ 85 Br. and For. St. Paps. 22 (1892-1893).

³⁸ United States-Mexican General Claims Commission, Sept. 8, 1923, Rules, Oct. 25, 1926, Art. VIII (1), Mimeograph Copy, Dept. of State, Feller,

this type are apparently construed to be obligatory though in neither case is it stated in the form of a positive obligation.

It has been argued that the provision that the tribunal "shall be bound to receive and consider all written documents or statements which may be produced" could only be intended to include "such documents or statements . . . as by the ordinary rules of evidence of the two countries or perhaps of either of them . . . may be considered admissible as evidence." This contention has not been sustained, however.³⁹ It would be manifestly impossible to apply such a rule in a case involving parties having widely differing systems of evidence in the municipal law. In the *May* case, Guatemala contended that since the question at issue concerned a Guatemalan contract, affecting real property situated in Guatemala, the claimant's evidence should be rejected as not having "value and authenticity," because it did not comply with the laws of Guatemala. In rejecting this contention, the Arbitrator after quoting the provision in Article 4 of the Protocol that it should be his duty "to decide both cases upon such evidence as may have been filed before him," declared:

"I read the above sentence to mean that I am not authorized to question the authenticity of the evidence filed before me by either Government, but that it is my duty to weigh the issues of law and fact presented by the claim and counter claim and to decide the entire controversy accordingly."⁴⁰

The conclusion reached by the Arbitrator is sound, namely, that the failure to prepare the evidence in compliance with the form required by Guatemalan law did not render it subject to exclusion. However, his assertion that he was not authorized to question the authenticity of the evidence is unique and not warranted either by the convention under which he was acting or by general practice.⁴¹

Justice Strong, in the *Pelletier* case, acting under a Protocol requiring that he should "receive and examine all papers and evidence relating to said claims, which may be presented to him on behalf of either Government," held that he must "look at all the papers submitted," but added that when he came to decide the

Mexican Commissions, p. 378; British-Mexican Claims Commission, Nov. 19, 1926, Rules, Art. 23, *Decisions and Opinions*, p. 13; French-Mexican Claims Commission, Sept. 25, 1924, Rules, Art. 25, *Règlement de procédure* (1925) 13; United States-Panamanian General Claims Commission, July 28, 1926, Rules, Art. 23, *Hunts Report* (1934) 848.

³⁹ *Sarah Ward* case (United States v. Gt. Britain), May 8, 1871, "Brief of the United States," pp. 4-6, *Memorials, Demurrers, etc.* (1871), vol. 1, No. 1.

⁴⁰ 1900 For. Rel. 656, 661.

⁴¹ Cf. *infra*, sec. 93.

questions he would endeavor to decide them on what he believed "in common sense and in the light of municipal and international law to be evidence."⁴²

In some domestic claims commissions where no formal pleadings are required, formal evidence is submitted only on behalf of one party, the claimant. In such a situation before the Board of Commissioners under the Act of March 3, 1849, it was contended that the Board was confined to the proofs presented by the claimant. The Board refused to concede the validity of this argument saying that a mere *prima facie* case for the claimant would not do if "public documents furnished from the archives of the government of the opposing party afforded contrary testimony."⁴³

A peculiar question related to the principal point under consideration arose out of the case of the *Brig "General Armstrong,"* submitted to arbitration by the United States and Portugal under a Convention of February 26, 1851. The *Brig*, an American privateer, having been scuttled by its crew after being attacked by a British Squadron in the Port of Fayal in the Azores in September, 1814, claim was made against Portugal for the damages resulting from its destruction within her territorial waters. The Convention provided in Article III that "copies of all correspondence which has passed in reference to said claim between the two Governments and their respective representatives shall be laid before the arbitrator." This correspondence, consisting of 21 documents, was submitted to the arbitrator, Louis Napoleon, President of the French Republic, who in his award of November 30, 1852, held that no indemnity was due from Portugal. Subsequently, repeated efforts were made by the claimant to obtain payment of the claim by Act of Congress, largely on the ground of mismanagement of the case by the Department of State, including an allegation that Mr. Webster, Secretary of State, had wrongfully refused to forward an argument by the claimants to the arbitrator. Upon reference to

⁴² United States v. Haiti, May 24, 1884, *Record of Pelletier Claim*, vol. I, pp. 492-493. Cf. *supra*, p. 123.

Commenting upon a provision of this nature in the convention of Aug. 7, 1892, between the United States and Chile as revived by that of May 24, 1897, the Agent of the United States said in his Report, that it seemed "to render any documents which might be presented to the Commission by or on behalf of either Government legitimate evidence, no matter whether they would be admissible under the ordinary rules of evidence or not." He added: ". . . inasmuch as it is perfectly competent for the Commission, after receiving and considering such papers, to give much, little, or no weight at all to them in arriving at a conclusion, some rule upon the subject is required to enable counsel to satisfactorily prepare the cases." Perry's Report (1901) 13.

⁴³ *Schooner "Scott" case*, ms. *Opinions*, 1849, *Board of Commissioners*, vol. 2, pp. 492, 503-506. For comment by Peru on argument of Bolivia in the *Bolivian-Peruvian Boundary Arbitration*, Dec. 30, 1902, that only the affirmations of the principal defense and the reply, together with annexes should be considered, see *Memoria de observaciones*, etc. (Buenos Aires, 1904) 5-6.

the Court of Claims the claim was rejected by it, Chief Justice Gilchrist dissenting. In his opinion Judge Blackford said with reference to Mr. Webster's refusal to forward the argument of the claimants:

"It appears to me that the language of the treaty shows that the arbiter was to determine the case upon the correspondence which had taken place on the subject between the two governments. That correspondence had been very extensive, and had been conducted with great ability on both sides. The questions of fact and of law belonging to the case had been fully investigated by the gentlemen to whom the business was confided. It would seem to have been proper, under those circumstances, for the parties to submit the case to the arbiter, upon the correspondence, without further argument by either of them."

As it subsequently appeared that certain correspondence with the legation at Rio de Janeiro relating to the case had not been included in that submitted to the arbitrator, renewed effort resulted in the passage of an act on May 1, 1882, appropriating \$70,739 for the benefit of the claimants. It appeared clearly, however, that all the relevant facts had been set forth in the papers submitted to the arbitrator.⁴⁴

Section 41. Evidence Submitted By or on Behalf of Governments. It is now well and properly settled that international tribunals may not receive evidence other than that presented by or on behalf of the Governments parties to the proceedings, unless specific provision be made for presentation in some other manner.⁴⁵ In modern arbitrations tribunals deal directly only with the agents or other principal representatives of the parties. In general arbitrations there has seldom been any question of the communication of information or evidence to the tribunal in any other manner than directly by the foreign office, or through the person designated by the Government to represent it before the tribunal.⁴⁶ Practice

⁴⁴ II Moore's *Arbitrations* 1071, 1092-1099, 1106, 1113.

⁴⁵ For provisions in arbitral agreements providing that evidence shall be received only when presented by or on behalf of the governments, see the cases cited on p. 130 in note 36. In addition, see the following: *Islands in the Bay of Fundy* case (United States v. Gt. Britain), Dec. 24, 1814, Art. IV, 1 Malloy's *Treaties* 614; Franco-Chilean Mixed Claims Commission, Oct. 19, 1894, Art. 4, *Convención de arbitraje entre Francia I Chile*, etc. (Santiago de Chile, 1895) 4; Brazilian-Peruvian Claims Commission, July 12, 1904, Rules of March 17, 1906, Art. 9, *Introduções e actas* (1916), vol. I, pp. 5-6.

⁴⁶ In the case concerning the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, the Permanent Court of International Justice accepted a copy of a decision of the Danzig High Court which had been submitted by a Danzig official other than its agent, treating it "not as evidence but as a simple piece of information." Series E, No. 12, p. 196.

with regard to claims commissions, where the rights and interests of many private individuals are involved, has presented a different problem.

Each claimant whose case is presented to a claims commission usually retains counsel to protect his interest. In many cases, such counsel has been active in the preparation of the claim, including the collection of evidence, and the prosecution of the claim with the claimant's government. Formerly, such counsel were permitted more or less direct access to the commission, and in some cases were required to perform certain duties in relation to the presentation of the claim to the commission. For example, the rules of some commissions required the claimant or his attorney to file the memorial of the claim, specifying in great detail what it should contain, and this memorial might be the only formal pleading for which provision was made. Again claimants or their agents were permitted to make verbal explanations before the commission of motions and arguments filed, to take and file the necessary proofs in support of the claims, and to participate in the examination of witnesses.⁴⁷ Needless to say, many abuses arose from this informal and frequently irresponsible practice, neither the government nor its agent being able to exercise proper control over cases thus presented. In recent times, therefore, direct access to the commission has been limited strictly to the agents of the parties, counsel for the claimants carrying on all necessary negotiations with the agent or with the foreign office of the claimant state.⁴⁸

A noteworthy instance of a controversy over the question whether claimants should be permitted the privilege of direct access to the commission is that which arose in the United States-Mexican Mixed Claims Commission of 1839. Article IV of the Convention of April 11, 1839 provided:

"All documents which now are in, or hereafter, during the continuance of the commission constituted by this convention, may come into the possession of the Department of State of the United States, in relation to the aforesaid claims, shall be delivered to the board. The Mexican Gov-

⁴⁷ United States-New Granadian Mixed Claims Commission, Sept. 10, 1857, Rules and Regulations, III Moore's *Arbitrations* 2138, 2139; United States-Costa Rican Mixed Claims Commission, July 2, 1860, Rules and Regulations, *ibid.* 2141; United States-Mexican Mixed Claims Commission, July 4, 1863, Rules and Regulation, Arts. 3, 4, *ibid.* 2153, 2154; United States-Spanish Mixed Claims Commission, Feb. 12, 1871, Regulations, Arts. I, VI, *ibid.* 2169, 2170; United States-Chilean Mixed Claims Commission, Aug. 7, 1892, Rules, Art. II, *ibid.* 2231.

⁴⁸ United States-British Claims Commission, Aug. 18, 1910, Rules, Arts. 1-10, Nielsen's Report (1926) 11-12; United States-Mexican General Claims Commission, Sept. 8, 1923, Rules, Oct. 25, 1926, Art. III (1) Mimeograph copy, Dept. of State, Feller, *Mexican Commissions*, p. 373; British-Mexican Claims Commission, Nov. 19, 1926, Rules, Art. 6, *Decisions and Opinions*, p. 10.

ernment shall furnish all such documents and explanations as may be in their possession, for the adjustment of the said claims according to the principles of justice, the law of nations, and the stipulations of the treaty of amity and commerce between the United States and Mexico of the 5th of April, 1831; the said documents to be specified when demanded at the instance of the said commissioners."⁴⁹

It was contended by the Mexican Commissioners that under this provision the Commission could only receive papers or evidence in support of claims transmitted through the Department of State. To this the American Commissioners offered strenuous objections. They contended that the article was "mandatory or directory towards the departments of Governments, but not restrictive of the natural, and political rights of the parties to present *directly* to the Board, such documentary evidence, as they might suppose would avail them." The Mexican Commissioners rejoined that the claimants had already been heard by the respective foreign offices; that it was the intent of the Convention, considered as a whole, that the cases should be decided on the basis of such evidence as had already been submitted to the foreign offices and by them to the commission, and such additional papers as they might consider it desirable to transmit; and that if it had been the intent of the Government that the claimants should have direct access to the Commission they would have included a specific provision in the Convention. As the Mexican Commissioners were willing to permit additional arguments and evidence to be submitted by the claimants provided they were transmitted through the Department of State, agreement was reached on that procedure after a lengthy debate.⁵⁰ Whether or not as a result of this incident it does not

⁴⁹ 1 Malloy's *Treaties* 1102.

⁵⁰ Ms. *Minutes of Proceedings* (1839), vol. I, pp. 77, 103-109, 137-139, 163, 179-183, 235-245, 337-363. Complying with the request of the national Commissioners of the United States-New Granadian Mixed Claims Commission of 1857 that the Department of State formally present its claims to the Commission, Secretary of State Seward transmitted with a letter of Nov. 13, 1861, "a mere list of the claims" saying: "I do this, however, with the explanation that, in the judgment of this Government, the provisions of the second article regarding the presentation of 'such papers in its possession as the Commissioners may deem important to the just determination of any claims,' have, on its part, been fully complied with, by the transfer to the Commission of all the documents either on the files of the Department of State or of the United States Legation at Bogota, relating to these claims; and with the distinct reservation, that with regard to claims arising out of the Panama Riot, this Government maintains the principle, that those claims have been presented by the United States and recognized by New Granada *en masse*, and that where, from any of the causes alluded to in my communication of the 5th ultimo, individuals have failed to file their claims arising out of the Panama Riot, within the period limited in the Convention, they are still entitled to investigation and decision upon their own *merits* and *proofs*, and the Department holds to its right to amend and add to the list in respect to claims of this character, should any be presented to it." Ms. *Journal of Proceedings* (1857) 31-32.

definitely appear, but subsequently claims conventions concluded by the United States regularly provided that the commissions should consider only such evidence as should be presented by or on behalf of the governments.

It need hardly be stated that in the case of domestic claims commissions claimants are uniformly permitted to present directly to the Commission the necessary pleadings and evidence in support of their claims.⁵¹ When provision is made for formal pleading before such commissions, the claimants assume the role of plaintiffs, and the Government that of defendant. With reference to matters of pleading and evidence, the procedure is assimilated to that of an ordinary arbitration, the claimants being personally and directly represented by counsel rather than by the agent of a government.

⁵¹ See, for example, the following order issued on Feb. 21, 1832, by the Domestic Commission established under the Act of Feb. 25, 1831, to distribute the Danish Indemnity (Convention of March 28, 1830): "... it may not be improper, besides, to say, that the duty of preparing and exhibiting evidence, rests wholly on the claimants; and that it does not become the Commissioners to designate what proofs should be exhibited; and that their obligations as to evidence are limited to a careful and impartial consideration of every matter, which the Claimants themselves may think proper to offer in support of their respective pretensions, it is therefore, now ordered, That all persons who have claims to be decided upon by this commission, be and they are hereby notified to present them, on or before the first day of May next, verified in conformity with the rules prescribed by this Board, and accompanied by all the proofs which the Claimants may think material." *Ms. Journal of Commissioners* (1831).

CHAPTER V

DOCUMENTARY EVIDENCE

IMPORTANCE OF DOCUMENTARY EVIDENCE

Section 42. Extent of Use. Probably the most outstanding characteristic of international judicial procedure is the extent to which reliance is placed in it upon the written word, both in the matter of pleadings and of evidence, but especially the latter. It may safely be said that evidence in written form is the rule and direct oral evidence the exception. It has already been pointed out that witnesses have been heard by the Permanent Court of International Justice in but one instance. *Ad hoc* tribunals, even claims commissions, resort to the direct testimony of witnesses only occasionally. It is of interest to inquire whether the extreme emphasis upon written evidence, including testimonial evidence presented in written form, is a result of the inherent nature of such proceedings, or whether it may be attributed to the influence of some other system of judicial procedure.

Evidence in Anglo-American law, it need hardly be stated, is predominantly oral. Most facts must be proved by the direct testimony of witnesses. Even with reference to documentary evidence, the foundation for its introduction must be laid by oral evidence, and to some extent the contents of the documents corroborated or proved by witnesses. The document must of course be proved by the testimony of witnesses to be the act of the person to whom it is attributed.¹ Judicial procedure could hardly differ more widely from international procedure in the matter of evidence.

Civil law procedure is characterized by the absence of the presentation of testimonial evidence directly before the court. Resort is had more frequently in German procedure to the direct examination of witnesses before the whole court than in other civil law countries, but even there the examination of witnesses is usually carried out before one member of the court delegated for the purpose.²

¹ V Wigmore's *Evidence* 238.

² Engelmann, *op. cit.*, 53-55; Baldwin, *op. cit.*, 19 Yale L.J. 75-78 (1909); Feller, "Modern Civil Law," *Encyclopedia of the Social Sciences*, vol. V, p. 647. See Art. 355 of the Code of Civil Procedure (1933). However, the principle of orality in the matter of testimonial evidence has been modified to some extent by the revisions effected in 1924 and 1933 to extend orality. Engelmann, *op. cit.* 620-622. See Art. 377 of the 1933 code.

In addition there are limitations on the use of oral evidence in proof of certain matters, analogous to the statutes of frauds in Anglo-American jurisdictions.³ It is in French procedure, and the countries patterning their procedure after it, that these limitations are the most extensive. There in civil matters written evidence is the rule and oral evidence the exception in all cases involving more than 500 francs.⁴ The general principle is that evidence produced must be written, and that when a writing is produced witnesses must not be brought in to assert anything against or beyond what is stated, in the writing. It is only in exceptional cases and under certain specified conditions that oral evidence is admitted.⁵

But even when oral evidence is admissible, it is presented to the court in written form having been taken beforehand at an *enquête*. Witnesses almost never appear directly before the court in civil cases.⁶ The principle that *lettres passent temoins* has been thoroughly established generally in Europe, says Bonnier, although it was not introduced in France until the Ordinance of Moulins in 1566, and the Ordinance of 1667.⁷ This has been due undoubtedly to a belief in the superiority of written evidence and in its greater freedom from fraud and corruption.

While there is a striking parallel between the use of evidence in written form in European civil law procedure, and in international judicial procedure, there is little direct evidence that the latter is due to the influence of the former. Certainly the technical re-

³ Lessona, *op. cit.*, vol. IV, pp. 57-58.

⁴ "For everything over 150 francs [500 francs, law of April 1, 1928] a written contract is required except in the following cases:

(a) When there is a commencement of proof in writing.
 (b) In cases of quasi-contracts, delicts and quasi-delicts.
 (c) Necessary deposits (in case of fire, etc.) and deposits with hotel keepers.
 (d) Obligations contracted in cases of unforeseen accidents, when a writing could not be obtained.

(e) When the creditor has lost the written proof by a fortuitous event, unforeseen and resulting from *vis major*." O. S. Tyndale, "The Organization and Administration of Justice in France," XIII Canadian Bar Rev. 656 (1935).

⁵ Le Paulle, "Study in Comparative Civil Procedure," XII Corn. L.Q. 32 (1926-1927); Bodington, *op. cit.* 2-4.

The French Civil Code provides in Art. 1341: "It is necessary to execute an instrument drawn up in the presence of notaries or made under private signature in all matters when a sum or value exceeding five hundred francs is involved, even for voluntary deposits and no proof by witnesses against or beyond the contents of an instrument, nor as to what is alleged to have been said previously, at the time of or since it was drawn up shall be allowed, even if the sum or value in dispute is less than five hundred francs." *The French Civil Code*, revised edition by Henry Cachard, Paris, London, 1930, pp. 369-370.

The Code of Civil Procedure provides in Art. 1343 as amended by the law of April 1, 1928: "A person who has brought an action for more than five hundred francs is not allowed to produce oral evidence, even by reducing his original claim." *Ibid.* 370.

⁶ Engelmann, *op. cit.* 52-53, 57-63, 72-75, 758.

⁷ Colin and Capitant, *op. cit.*, vol. II, p. 436; Bonnier, *op. cit.* 115.

quirements of French law as to written evidence do not obtain in international procedure. The emphasis on written evidence in international procedure seems to have been influenced to a great extent by the nature of the problems involved. The distances involved in the transactions forming the subject matter of many international proceedings have also made necessary the use of written evidence.⁸ In arbitrations between states in their own right the evidence of the contested questions has frequently been a matter of public record. Where the evidence does not already exist in writing, purely practical considerations have forbidden the taking of testimony before the tribunal. Except before claims commissions, proceedings have been more in the nature of an argument on appeal in municipal proceedings where the evidence introduced is necessarily principally, if not entirely, written. Even when oral evidence has been resorted to, tribunals have required that available written evidence of important transactions must be produced.⁹ However, while these practical considerations appear to have been the predominating factors in the use of written evidence in international proceedings, the influence of lawyers trained in the civil law, with their distrust of oral evidence, is a factor not to be disregarded.

THE "BEST EVIDENCE" RULE

Section 43. General Principles. The so-called "best evidence rule" derived from Anglo-American law has been more or less loosely used by international tribunals with reference to a number of different situations. Even in Anglo-American law it has no very definitely fixed meaning. Wigmore says it "is merely a loose and shifting name for various specific rules," the chief of which is that, in general, the terms of a document must be proved by the production of the document itself. It has further been employed to designate the hearsay rule, the group of rules, by which the testimony of one witness is preferred over another, and certain principles of substantive law, such as, that the best evidence of the proceedings of a Court is its own record.¹⁰ The terms primary and secondary evidence are sometimes used rather than the term "best evidence." It is in this sense of accepting so-called "secondary" evidence as satisfactory only when "primary" evidence is not available that the rule is generally used in international procedure.

⁸ See *supra*, p. 16, and *infra*, p. 172.

⁹ *Laird* case (United States v. Mexico), July 4, 1868, VI ms. *Opinions* 516-517; *Briggs* case, *ibid.*, vol. VI, pp. 387-388; *Dantin* case, *ibid.* vol. IV, p. 55; *Cummings* case, *ibid.*, pp. 633-634; *Santa Eleana Nitrate Co., Ltd.*, case (Gt. Britain v. Chile), Sept. 26, 1893, *Reclamaciones* (1894-1896) 20.

¹⁰ II Wigmore's *Evidence* 715-717. Wigmore considers that "the sooner the phrase ['best evidence'] is wholly abandoned, the better."

A rule essentially like the "best evidence" rule obtains also in French law. Bonnier states that the law requires in general that the original of an act shall be produced when that original exists, the same rule being applicable with reference to witnesses. That is, "secondary" witnesses can be used to prove what "primary" witnesses have said only when the latter are not available. What are called "actes authentique," that is documents duly executed before a notary, must be proved by a certified copy provided by the notary. As to other documents, copies have decreasing weight as they are further removed from the original document.¹¹

As applied by international tribunals, the "best evidence" rule relates essentially to the weight of the evidence rather than to its admission. Secondary evidence will not necessarily be excluded because better evidence is held to have been available, but less weight, or in some cases no weight at all, may be attached to it.¹²

The rule is generally broadly stated as a requirement that the best available evidence be produced, without reducing it to specific technical requirements as to particular types of evidence. A typical statement of the rule as thus enforced is the following taken from the report of the Domestic Commission established by the Act of June 7, 1836, to adjudicate the claims presented under the convention of February 17, 1834, with Spain:

"Each claimant was required to produce the highest evidence, which the nature of his claim admitted, to establish the allegations of his memorial. Where such evidence could not be produced from loss or accident, and from no fault imputable to the claimant, or, where any reasonable effort had been made to procure it, without avail, secondary evidence was admitted with very great caution.

"In every case resting upon the condemnation of Spanish tribunals, the decree of condemnation properly authenticated was considered as indispensable evidence, unless where it indubitably appeared that timely and vigorous efforts had been made to procure it, but without success."¹³

¹¹ Bonnier, *op. cit.* 218-219. See also Art. 1335 of the French Civil Code, Cachard, *op. cit.* 367.

¹² See *supra*, pp. 12-14.

"The Commission . . . realizes that the weighing of outside evidence, if any such be produced, may be influenced by the degree to which it was possible to produce proof of a better quality. In cases where it is obvious that everything has been done to collect stronger evidence and where all efforts to do so have failed, a court can be more easily satisfied than in cases where no such endeavor seems to have been made. This consideration has guided and will guide the Commission in other cases, for instance, as regards the fixing of the amount of the award. But in the claim now before them the Commission cannot believe that it would have been impracticable to produce at least some corroboration of the statement of the claimant." *Odell case* (Gt. Britain v. Mexico), Nov. 19, 1926, *Further Decisions and Opinions*, pp. 61, 63.

¹³ *V Moore's Arbitrations* 4544. See statement in report of the Domestic Claims Commission, established under the Act of July 13, 1832, to distribute

The liberality of tribunals in the admission of evidence has no doubt been a contributing factor to their frequent insistence on the production of the best evidence of which the circumstances of the case permit. Thus the United States in its Counter-Case in the *Norwegian Claims* case asserted that this absence of technical rules made it more necessary that the best evidence available be produced. It declared that it had "endeavored as far as possible to support its position by properly authenticated contemporaneous official records . . . to supplement these official records by the contemporaneous records of private persons, . . . to secure primary as against secondary evidence where possible, to explain the use of secondary evidence where such use is unavoidable, and to avoid reliance upon hearsay, particularly with respect to the contents of documents so far as practicable."¹⁴

In the *Eastman* case before the United States-New Granadian Commission of 1857, involving a claim for indemnity for an alleged robbery by bandits of a large sum of money, the Umpire rejected the claim "on the ground of insufficiency of evidence." He asserted that "the claimant ought to have furnished in detail a statement of the circumstances, some of which doubtless might have been supported by independent testimony, under which this sum of money came into his possession," and that "in the absence of such statement and testimony," he did not consider that the claimant had "adduced the best evidence the case admits of."¹⁵

Section 44. Production of Original Documents. As stated in the preceding section, the "best evidence" rule in Anglo-American law relates primarily to the production of original documents. "The essential principle of preferred evidence," says Wigmore, "is that it is to be procured and offered if it can be had . . . That thought dominates . . . the rule preferring the production of

the indemnity paid by France under the Convention of July 4, 1831. 5 Moore's *Adjudications* 352.

Sir Richard Webster declared during the proceedings in the *Fur Seal Arbitration* "that the best evidence is to be at the service of this tribunal if it is possible." *Proceedings* (1895), vol. XI, p. 9. See also contention of the claimants in the case of the *Ship "Helen Brewer"* (United States v. France) that the "best evidence" of what took place on the vessel at the time of a collision "necessarily comes from such vessel." *Argument on behalf of the Claim of the Owners of the ship Helen Brewer*, p. 13.

¹⁴ *Counter-Case of the United States* (Washington, 1922) 4. In the case of the *Landreau Claim*, Peru objected in her Answer to the use of a newspaper article as proof of a list of guano deposits saying that "the official list" referred to is the best evidence and not the improved newspaper publication." *Answer of the Republic of Peru* (Washington, 1922) 49. See also the "*David J. Adams*" case (United States v. Gt. Britain), Aug. 18, 1910, "Shorthand notes of the Proceedings," pp. 6-7, *Pleadings and Awards* (1910), vol. 10, Claim No. 18; *Lehigh Valley Ry. Co.* case (United States v. Germany), Aug. 10, 1922, *Oral Arguments*, The Hague, Sept. 18-30, 1930 (Washington, 1932) 4, 20.

¹⁵ *Ms. Journal of Proceedings* (1857) 55-56.

the document itself."¹⁶ The rules concerning the production of the document, and the circumstances under which a substitute may be introduced are extensive and technical.¹⁷ Similarly the introduction of certified copies of "actes authentique" and of the originals or copies of documents privately executed is surrounded by technical rules in French law. Copies in the latter case have a definitely limited probative force.¹⁸

The rules concerning the production of original documents are much less technical in international procedure, although the essence of the rule, that is, that the tribunal be informed by authentic evidence of the contents of basic documents, is stressed perhaps as strongly as in municipal procedure. Ordinarily a duly certified copy of the original document is accepted as satisfactory proof of the contents of the original.¹⁹ For example, it is frequently provided that when an original paper on file in the archives of a government cannot be conveniently withdrawn a duly certified copy will be received in evidence in lieu of the original.²⁰

¹⁶ II Wigmore's *Evidence* 743. See also McCormick, "Evidence," V *Encyclopedia of the Social Sciences*, op. cit. 643.

¹⁷ II Wigmore's *Evidence* 734-736, 762-777, 796-829.

¹⁸ Bonnier, op. cit. 646-652. See Arts. 1334-1337 of the Civil Code. For German law, see Arts. 415ff. of the Code of Civil Procedure (1933).

¹⁹ "The authenticity of these contracts [between the Netherlands and certain native chiefs in the East Indies] cannot be questioned. The fact that true copies, certified by evidently the competent officials of the Netherlands' Government, have been supplied and have been forwarded to the Arbitrator through the channels laid down in the Special Agreement, renders the production of facsimiles of texts and of signatures or seals superfluous. This observation equally applies to other documents or extracts from documents taken from the archives of the East India Company, or of the Netherlands Government. There is no reason to suppose that typographical errors in the reproduction of texts may have any practical importance for the evidence in question." *Palmas Islands* case (United States v. The Netherlands), Jan. 23, 1925, *Arbitral Award* (1928) 42.

In American law a copy must always be proved "by a witness qualified to say that it represents the contents of the original document." II Wigmore's *Evidence* 930.

²⁰ United States-British Mixed Claims Commission, May 8, 1871, Rules, Art. 9, Hale's Report (1894) 179; United States-Venezuelan Mixed Claims Commission, Dec. 5, 1885, Rules, Art. XVI, *Opinions in Principal Cases* (1890) 8; Tripartite Claims Commission (United States v. Austria and Hungary), Rules, Art. VIII (c) Bonyng's Report (1930) 52; United States-German Mixed Claims Commission, Aug. 10, 1922, Rules, Art. V (a), Morris' Report (1923) 11-14; British-Mexican Claims Commission, Nov. 19, 1926, Rules, Art. 24, *Decisions and Opinions*, p. 13.

The Convention of April 30, 1803, having provided that the Commission to be appointed under it should examine all the accounts of the different claims "without removing the documents" from the French Foreign Office, the Commission obtained "correct and authenticated copies of the documents and vouchers." The Commissioners were influenced in this action partly by the consideration "that these authenticated documents would be transmitted to the United States, and would . . . furnish to their Government the evidence upon which the decisions . . . were formed." 5 Moore's *Adjudications* 160, 223-224.

See, however, the following statement from the *Minutes* of the United States-Mexican Claims Commission of 1839: "The Mexican commissioners

In some cases, however, when the original document is of such a character as not to lend itself to accurate reproduction, or when an intrinsic value or significance attaches peculiarly to the original, the production of the original has been required. It has been required by the rules of certain claims commissions that in the case of claims arising from the loss of a ship or its cargo, the claimant produce, if it could be obtained, "the original clearance, manifests and all other papers and documents required by the laws of the United States."²¹ Some claims commissions have required the production of the original instrument as a prerequisite to recovery in cases in which the claim was based on a bond or some analogous fiscal obligation of a state or its agencies.²²

Although it would seem that with reference to a claim involving the ownership of real property, a party should be required to produce an original title deed or a duly authenticated copy of the original record of the title, a somewhat more lenient view was taken by Östen Undén, sole arbitrator, in a dispute concerning some forests in Central Rhodophia of which a certain number of Greek nationals had been dispossessed by the Bulgarian authorities. The arbitrator was appointed on October 2, 1930, by the Council of the League of Nations, upon the request of Bulgaria,

then presented a pile of original papers, from the ministry of Justice of Mexico and the commercial court of Vera Cruz, in relation to the case of the Perer D. Vroon; the reception of which the American Commissioners declined as their Mexican Colleagues objected to filing them with the archives of the Board, on account of their being *originals*, stating, however that they would furnish certified copies thereof for file." *Minutes of Proceedings* (1839), vol. 1, p. 451.

²¹ Board of Commissioners, Act of March 3, 1849, Rules, Arts. 6-8, *Printed Circular*, Apr. 23, 1849, National Archives of United States; United States-New Granadian Mixed Claims Commission, Sept. 10, 1857, Rules, Arts. 7-9, ms. *Journal of Proceedings* (1857) 10; United States-Colombian Mixed Claims Commission, Feb. 10, 1864, Rules, Arts. 7-9, *Printed Circular*, Aug. 24, 1865, National Archives of United States.

²² *Hammeken* case (United States v. Mexico), July 4, 1868, (orders issued by the Mexican Government against funds which were to have been provided by a loan from the United States), IV Moore's *Arbitrations* 3470; *Boccardo* case (Italy v. Venezuela), Feb. 13, 1903 (internal bonds, required by Umpire Ralston to be produced before the Commission and cancelled at the time of the award), Ralston, *Law and Procedure* (1926) 221.

"The claimant has not presented the original bonds or any part of them which he may have in his possession. The failure to present said bonds makes an appreciation regarding the legitimacy of the claim impossible because its essential foundation, which is the ownership or existence under the control of Ballistini of such certificates or bonds and the exact ascertainment of their amount, is wanting." *Ballistini* case (France v. Venezuela), Feb. 27, 1903, Ralston's Report (1904) 505. Umpire Filtz, however, in the *Compagnie Generale des Eaux de Caracas* case before the Belgian-Venezuelan Commission of 1903 did not require the production of the bonds, stipulating, however, in his award that they should be presented for perforation at the time of payment of the last installment of the award. Ralston's Report (1904) 271, 290. Cf. demand of the American Agent in the *St. Croix* case that the originals be produced of certain of Champlain's maps, copies having been submitted by the British Agent. United States v. Gt. Britain, Nov. 19, 1794, 1 Moore's *Adjudications* 68.

under the provisions of Article 181 of the treaty of Neuilly. Over the objection of Bulgaria, he accepted as satisfactory proof of ownership certain "certificates of ownership" produced by the Greek Government, which had been issued by the Turkish Government under a decision of the Grand Vizier of May 1, 1913, although it appeared that the original titles of ownership (tapons) had not been lost. Bulgaria contended that the original titles had not been produced because they contained references disadvantageous to the allegations of the claimants. The Arbitrator asserted that he agreed with the opinion of the Greek Government that "the obligation assumed by Bulgaria to respect official titles emanating from the Turkish authorities implies the obligation to recognize the certificates of ownership duly issued by the competent Turkish authority on the basis of the Turkish land register in which the property was recorded."²³ Generally speaking an official document or a public record is the "best evidence" of the facts or rights which it purports to record, and is always admissible in international, as it generally is in municipal proceedings.²⁴

In the *Bougerot* case before the United States-French Mixed Claims Commission of 1880, the Commission accepted a photographic copy as satisfactory evidence of a receipt for certain cotton burned by Federal troops. The Commission observed that "the original receipt would be preferable to a photographic copy for examination," but added that such copies are made "to so exactly resemble the originals that they may well be used when the original cannot be had for the purpose."²⁵ There can be little if any objection to the use of photographic or photostatic copies so long as their authenticity as true copies of the originals is duly attested by competent officials. Any document produced as an

²³ Arbitral Award, March 29, 1933, 28 A.J.I.L. 760, 796-797 (1934). With reference to certain objections to the contents of the certificates on the ground that they were inaccurate, containing information not conforming to the Turkish register, the Arbitrator ruled that Bulgaria's proper remedy would have been to institute proper proceedings in her own courts to test the validity or probative value of the certificates. It was too late, he said, to raise that question in the arbitral proceedings especially as the certificates appeared authentic and essentially accurate. *Ibid.* 797-801.

Cf. *Aristotelis A. Megalidis v. Etat turc* (Turk-Greek Mixed Arbitral Tribunal) 8 *Recueil des décisions* 386, 395 (1928), in which the tribunal admitted the parol testimony of the claimant upon the failure of the defendant to produce the proces-verbal of a complex financial transaction known to be in his possession.

²⁴ "Wherever there is a duty to record official doings, the record thus kept is admissible . . . The only matter of doubt can be whether there is in a given case a duty to record. It is clear that such a duty need not be expressly prescribed by statute or regulation, but may be implied from the nature of the office." III Wigmore's *Evidence* 406. It is to be observed, however, that such documents are self-serving and must be viewed with a certain amount of circumspection for that reason. This is especially true with respect to their own public documents offered by governments before international tribunals. Cf. *infra*, sec. 93.

²⁵ *Minutes of Proceedings*, pp. 942-943.

original is of course worthless as evidence unless duly verified by a party or official competent to make such verification.²⁶

The rule of Anglo-American law that the record of a court is the "best evidence" of its proceedings was applied in the *Idler* case before the United States-Venezuelan Mixed Claims Commission of 1885. In this case the validity of the claim turned on the question whether the Government of Venezuela had instituted certain proceedings against the claimant in its Superior Court within the time prescribed by law. The Commission refused to accept the recital of the proceedings of the Superior Court as contained in the opinion of the Supreme Court on appeal, saying:

"It seems to us in a case like this, the best evidence reasonably attainable should be required before an international tribunal. . . .

"Had the court given dates so that a 'study' of them could now be made, the difficulty would still remain, even though they disclosed jurisdiction in the Superior Court. They are not the best evidence. That is the record (unless shown to have been lost). If there never was a record then, in contemplation of law, the court did not act. It is elementary that a court of record (and this was one) speaks *only* through its record."²⁷

Section 45. Resort to "Secondary" Evidence. "Secondary evidence will be admitted upon proper foundation, according to recognized rules of evidence."²⁸ The rule thus succinctly stated in the *Regulations* of the United States-Spanish Mixed Claims Commission of 1871 accurately portrays the practice of international tribunals, except that the "recognized rules of evidence" mentioned, apparently of municipal law, are not strictly enforced. Proper foundation consists of the showing of an acceptable reason for the non-production of the "best" or "primary" evidence. Proof of destruction of an original record always "opens the door to secondary evidence."²⁹ Satisfactory proof of loss or of inability to find the document are also sufficient to let in secondary evidence, and these three reasons are probably the ones most frequently advanced for nonproduction.³⁰ What constitutes satisfactory proof of destruction, loss or inability to find the document is a matter for the discretion of the tribunal. Secondary evidence may be in-

²⁶ *McKenny* case (Board of Commissioners), Act of March 3, 1849, ms. *Opinions*, 1849, vol. II, pp. 873-876. See *Mazipil Copper Co., Ltd.* case (Gt. Britain v. Mexico), Nov. 19, 1926, *Decisions and Opinions*, p. 133.

²⁷ *Opinions in Principal Cases* (1890) 166-168.

²⁸ III Moore's *Arbitrations* 2169.

²⁹ *Schooner "Ulaia"* case (United States Court of Claims), *Opinions in French Spoliation Cases* (1912) 411-412; Ralston, *Law and Procedure* (1926) 221.

³⁰ *Stevens* case, Court of Commissioners of Alabama Claims, July 13, 1882, to Oct. 31, 1883, ms. *Journal of Proceedings* (1883) 62-63.

roduced concurrently with primary evidence, a practice which is widely followed by parties to international proceedings.

The best secondary evidence available should be produced. In most instances, that will be a copy of the original. Frequently, however, no such copies exist. In the *Schooner "Ulalia"* case, the Court of Claims admitted a translation of the decree of condemnation of the French Prize Court which had been obtained by the master of the vessel at the time of the condemnation proceedings and deposited with the insurance company. The translation "is a kind of copy" said the Court, "inferior to that of a literal copy, but still a copy of the thought and meaning of the original." The Court regarded the fact that the insurance company had paid the loss on the basis of the translation as "the highest moral evidence of its verity."³¹ Entries in books of account kept by the claimant have been accepted as satisfactory evidence of the payment of money, especially in the absence of countervailing proof.³² The British-Mexican Claims Commission of 1926 "having seen a certified copy of the will" of the deceased husband of the claimant accepted it as sufficient evidence that the claimant was the "sole heir of the husband and the executrix of the will."³³

The acceptance of secondary evidence does not excuse a party from producing partial or corroborating primary evidence which may be available. Nor does such acceptance relieve him from the obligation of establishing by substantial evidence the contentions or facts to which the non-available primary evidence relates.³⁴ However, in some instances, tribunals have appeared inclined to accept as sufficient secondary evidence of considerable less evidential value than the primary evidence for which it was substituted. In the *Francke* case on the basis of secondary evidence consisting of a report by the Jefe de Cuartel [Chief of Precinct] described as "scanty" but "worthy of credence on account of its frankness," the United States-Mexican General Claims Commission of 1923 disallowed a claim for indemnity on account of alleged wrongful arrest and detention, and cruel and inhuman treatment. Commissioner Nielsen dissented, partly on the ground that extensive written records of the proceedings which "must have been available" were not produced in support of the Report of the Jefe de Cuartel. The evidence in this case, he pointed out, was much less substantial than that which had been held in the *Pomeroy's El Paso*

³¹ *Opinions in French Spoliation Cases* (1912) 412.

³² *Keller case* (United States v. Mexico), July 4, 1868, VI ms. *Opinions* 532.

³³ *Henderson case, Further Decisions and Opinions*, pp. 30-31.

³⁴ *Dreyer case* (Board of Commissioners Act of March 3, 1849), ms. *Opinions*, 1849, vol. 2, pp. 538-539; *Palmas Island case* (United States v. Netherlands), Jan. 23, 1925, *Arbitral Award* (1928) 24-25, 33; *Bolivian-Peruvian Boundary Arbitration*, Dec. 30, 1902, *Replica de parte de Bolivia al alegato peruano en el litigio de limites* (Buenos Aires, 1907) 47-48.

Transfer Co. case to be insufficient to warrant an award in favor of the claimant.³⁵ So in the "*Argonaut*" and "*Col. Joseph H. French*" cases before the United States-British Mixed Claims Commission of 1910, the Commission held on the basis of "two brief reports" that the seizure of the vessels had been made within the three-mile limit, although it pointed out that none of the official papers of the "*Cutter Critic*" which made the seizures had been submitted.³⁶

Proper foundation must be laid for the non-production of primary evidence, however, especially where the secondary evidence is weak. Production of secondary evidence without offering convincing proof of the necessity for reliance on it may result in an adverse award.³⁷ Secondary evidence may also be objected to on the ground that it does not faithfully reflect the contents of the documents it is intended to prove.³⁸

Certain kinds of secondary evidence have been considered unacceptable even though it might be impossible to obtain original

³⁵ *Opinions* (1931) 75-82. For *Pomeroy El Paso Transfer Co.* case, see *Opinions* (1931) 1-7.

³⁶ Nielsen's Report (1926) 509, 512. See also *Weil* case (United States v. Mexico), July 4, 1868, in which an award of \$285,000 was made on the basis of affidavits drawn from the "personal recollections" of the claimants, it having been alleged that all documentary records had been lost. Commissioner Zamacoma, dissenting, declared that nothing had had "so much weight with [him] . . . as the entire absence of any documentary evidence." House Ex. Doc. No. 103, 48th Cong., 1st. Sess., pp. 22, 24, 26. The evidence was later found to have been entirely fabricated, and the award remitted to Mexico by the United States. See *infra*, sec. 103.

³⁷ *Phipps* case (United States v. Mexico), July 4, 1868, VII ms. *Opinions* 441 (for *Opinions* of American and Mexican Commissioners see IV ms. *Opinions* 551-554); *White* case, *ibid.*, Opinion of Commissioner Zamacoma, VII ms. *Opinions* 337-338; (claim dismissed by Umpire, VI ms. *Opinions* 502); *Marks and Co.* case, *ibid.* Opinion of Commissioner Palacio, V ms. *Opinions* 363 (award reduced in amount, VI ms. *Opinions* 377). In the *Avak* case in the *Turkish Claims Settlement*, Commissioner Nielsen held that the secondary evidence offered was unsatisfactory, especially as the evidence to show that the original documents showing ownership and value of property had been destroyed, did not appear plausible. He disallowed the claim. Nielsen's Report (1937) 651, 659.

³⁸ See objection by the United States in the *Norwegian Claims* case, June 30, 1921, to a letter from the Norwegian Foreign Office to the Norwegian Shipowners Association as proof of a decision of Oct. 4, 1917, by the United States Shipping Board:

"The prejudicial effect of this secondary evidence becomes immediately apparent when the action taken by the Shipping Board is compared with the action recorded in the letter certified by the Norwegian Shipowners Association. What the Board did was to rule that it was its duty to retain for urgent military purposes all vessels building in this country for foreign account, title to which was commandeered by the United States on August 3 (U. S. case app., p. 143) i.e., the Board decided to keep something it already had. But the telegram published by the Norwegian Shipowners Association says that the Board 'decided to requisition all Norwegian contracts similar to those of the British and French' (Norwegian Case Doc. Evidence, p. 117) i.e., presumably to take something which it did not theretofore have." *Counter Case of the United States* (Washington, 1922) 7. For Reply of Norway, see *Argument of Norway* (Washington, 1922) 11.

documentary evidence. Objection was made in a number of cases by the United States-Mexican Claims Commission of 1868 to the production of copies of depositions.³⁹ The municipal law doctrine of ancient documents has been invoked, and would no doubt be applied in a proper case.⁴⁰ In adjudicating the French Spoliation cases, however, the Court of Claims refused in one instance to accept a newspaper account, contemporary with the events, as an ancient document, saying that because of its indefinite source this account was "beside the competency of newspaper declarations in general." It added that newspapers might be good as ancient writings for some purposes "as for instance to show prices current, the state of the market, and the arrival and departure of vessels from the port," but that as proof of the illegal acts of the French Government they were "absolutely worthless."⁴¹ In another instance, it refused to accept as proving capture and condemnation certain affidavits executed twenty-two years after the event, saying, however, that it had always received true "contemporaneous papers" as ancient documents "to be considered according to their genuineness."⁴²

It has been held by the Permanent Court of International Justice that a party is "only responsible for the conformity of documents with the secondary sources which it had quoted," and not with the originals.⁴³

Section 46. Proof of Nationality. Since the right of a government to present claims before an international tribunal on behalf of individuals depends primarily upon such persons having its nationality, numerous problems arise before such tribunals concerning the proper proof of the status of nationality. With the sub-

³⁹ *Riggs* case, Opinion of Commissioner Wadsworth, V ms. *Opinions* 339 (claim dismissed by Umpire Thornton, VI ms. *Opinions* 371); *Cabazos* case, Opinion of Commissioner Wadsworth, VI ms. *Opinions* 1 (claim dismissed by Umpire Thornton for want of jurisdiction, *ibid.* 262); *Pond* case, Opinions of Commissioners Wadsworth and Zamacoma, III ms. *Opinions* 180-183 (claim disallowed by Umpire Thornton, IV ms. *Opinions* 601). See also *Bryant* case in which the accuracy of a copy of a letter was questioned, the original not having been produced though said to be in possession of the Mexican authorities. I ms. *Opinions* 295.

⁴⁰ *Robinson and Williams* case (United States v. Chile), Aug. 7, 1892, "Statement and Brief of Claimant," *Memorials, Briefs and Documents* (1892), vol. IV, No. 33; Shield's Report (1894) 147-149.

"... an ancient document, under certain conditions, is to be taken as sufficiently evidenced, in regard to its genuineness of execution to be submitted to the jury. . . .

"... the period of thirty years [suffices] to constitute an 'ancient' document; except under some special statutory rules." IV Wigmore's *Evidence* 555, 557.

⁴¹ *Brig "Juno"* case, *Opinions in French Spoliation Cases* (1912) 498-500.

⁴² *Brig "Juno"* case, *ibid.* 303-304. This was an earlier proceeding in same case cited in preceding note. Motion for a new trial on the basis of newly discovered evidence consisting of the newspaper article described in the text was dismissed.

⁴³ *Peter Pazmany University* case, Series A/B, No. 61, p. 215.

stantive question of the requirements of municipal law prerequisite to the acquisition of nationality, this study is not concerned. There is considered here only the question of the kinds of proof which may properly be adduced to establish compliance with those requirements. This question not infrequently takes the form of determining what is the best evidence for establishing the necessary facts, and what other evidence may be accepted as satisfactory if the best evidence is not available. It may arise either with reference to the evidence necessary to establish the existence of nationality acquired through naturalization, or nationality acquired by birth.

Section 47. Nationality Through Naturalization. In the case of naturalization, the best evidence is the original certificate of naturalization issued by the competent authorities of the state, or an authentic copy of the record of the proceedings by which nationality was conferred.⁴⁴ While such documentary evidence is the best evidence, it may nevertheless be attacked by the production of proof to impeach its authenticity, or to show that naturalization was improperly obtained through misrepresentation or fraud in the municipal proceedings.⁴⁵ If such primary evidence is not available, secondary evidence will be accepted upon satisfactory proof of the loss or destruction of the certificate and the record of the naturalization. Claimant's own affidavit that the record is lost has been accepted as sufficient to let in secondary evidence, but ordinarily would not be sufficient unless corroborated by other proof.⁴⁶ Mere ignorance of the identity of the court in which the naturalization was effected will not suffice.⁴⁷ Affidavit by the agent of the party that the record has been destroyed is not satisfactory, as claimant is in a much better position to know whether the record is or is not lost or destroyed.⁴⁸ Allegation of the loss of the rec-

⁴⁴ *Kraus* case (United States v. Mexico), July 4, 1868, IV ms. *Opinions* 339; *Brach* case, *ibid.*, V ms. *Opinions* 31-32; *Bishop* case (United States v. Germany), Aug. 10, 1922, *Administrative Decisions and Opinions*, etc. (1925) 577, 578.

⁴⁵ It is now well established that the validity of a naturalization certificate may properly be examined by an international tribunal. See exhaustive examination of this question both by the tribunal, and in diplomatic correspondence concerning cases before the United States-Spanish Mixed Claims Commission of 1871, III Moore's *Arbitrations* 2590-2647. See also *Medina* case (United States v. Costa Rica), July 2, 1860, Opinion of Umpire Bertinatti, *ibid.* 2583-2589; *Lizardi* case (United States v. Mexico), July 4, 1868, VII ms. *Opinions* 380; *Kuhnagel* case (United States v. France), Jan. 15, 1880, Boutwell's Report (1884) 72; Ralston, *Law and Procedure* (1926) 175-179.

⁴⁶ *Dantin* case (United States v. Mexico), July 4, 1868, Opinion of Commissioner Wadsworth, III ms. *Opinions* 417 (claim disallowed on merits by Umpire Thornton because of insufficient evidence, IV ms. *Opinions* 55).

⁴⁷ *Devine* case, *ibid.*, Opinion of Commissioner Zamacoma, V ms. *Opinions* 140, 142-143 (claim dismissed by Umpire Thornton, VII ms. *Opinions* 473).

⁴⁸ *Collon* case, *ibid.*, Commissioner Wadsworth for the Commission, VII ms. *Opinions* 235-236.

ords of the court of naturalization must refer specifically to the records of the particular proceedings, unless proof is adduced of the loss or destruction of all the records of the court for the period of the naturalization.⁴⁹

Proof that the original records are not available does not relieve the claimant of the obligation of producing satisfactory secondary evidence of his naturalization. Umpire Thornton refused to accept as sufficient the testimony of a co-claimant that he had seen the naturalization of the claimant.⁵⁰ Nor is the claimant's own unsupported testimony that he has been naturalized sufficient, even if given under oath.⁵¹ Counsel's unsupported statement that a passport was issued to the claimant is inadequate.⁵² In the *Callegan* case the American and Mexican Commissioners of the United States-Mexican Claims Commission of 1868 concurred in declining to accept as adequate proof of citizenship "the statements of fugitive acquaintances to the effect that he [the claimant] is a citizen," there being no showing that a copy of the record was not available.⁵³ Evidence showing long-continued residence in the United States, accompanied by voting and the exercise of other privileges of citizenship, was held by the United States-German Mixed Claims Commission of 1922 to be insufficient to establish citizenship in the absence of an affirmative showing that the Court record of the naturalization had been lost or destroyed.⁵⁴

No inclusive statement of the secondary evidence that may be acceptable can be attempted, but certain general principles which would appear to be applicable may be indicated. Umpire Thornton in the *Pradel* case before the United States-Mexican Mixed Claims Commission of 1868 accepted as establishing the claimant's citizenship evidence of his having been treated as such in diplomatic correspondence between the American Minister at Mexico City, and the Mexican Foreign Office. He asserted that "he thought he would do injustice to the intelligence and the honesty of the Mexican authorities and of the ministers of the United States in Mexico if he did not believe that it was only after a full examination of the proofs exhibited by Pradel that they had determined upon

⁴⁹ *Remes* case, *ibid.*, Commissioner Zamacoma for the Commission, V ms. *Opinions* 408, 409.

⁵⁰ *Speyer* case (United States v. Mexico), July 4, 1868, II ms. *Opinions* 474, 475.

⁵¹ *Robinet* case (Chinese Indemnity, Domestic Claims Commission), Act of March 3, 1859, House Ex. Doc. No. 29, 40th Cong., 3d Sess., pp. 163, 164; *Levy* case (United States v. France), Jan. 15, 1880, *Minutes of Proceedings*, pp. 923-924; *Barrios* case (United States v. Mexico), July 4, 1868, VI ms. *Opinions* 335-336; *Bouttier* case, *ibid.*, VII ms. *Opinions* 492, 494; *Vallejo* case, *ibid.*, VI ms. *Opinions* 467.

⁵² *Collon* case, *ibid.*, VII ms. *Opinions* 235-236.

⁵³ *Ibid.* 257-258.

⁵⁴ *Bishop* case (United States v. Germany), Aug. 10, 1922, *Administrative Decisions and Opinions*, etc. (1925) 577-579.

acknowledging his right to American citizenship."⁵⁵ This appears to represent a sound practice if limited to cases in which there is evidence in the correspondence that particular attention has been given to the question of citizenship. It would seem on principle that like effect should be given to evidence of consular registration of citizens when the consular regulations require the exhibition of adequate evidence of citizenship as a prerequisite to registration.⁵⁶ Commissions have differed, however, as to the effect that should be attributed to consular registrations. They have been accepted by the following Commissions: The United States-Mexican of 1868,⁵⁷ the Spanish-Venezuelan of 1903,⁵⁸ the British-Mexican of 1926,⁵⁹ and the French-Mexican of 1924,⁶⁰ and rejected by the German-Mexican Commission of 1925,⁶¹ the Italian-Mexican Commission of 1927,⁶² and the tribunal in the *Expropriated Religious Properties* case.⁶³ The United States-Mexican General Claims Commission of 1923 accepted testimony furnished by consular officers generally as of special value.⁶⁴ However, mere recognition

⁵⁵ III ms. *Opinions* 451-453. Accord: *Polack* case (Board of Commissioners), Act of March 3, 1849, ms. *Opinions*, 1849, vol. I, pp. 406-409.

⁵⁶ See Feller, *Mexican Commissions*, pp. 274-275. In the course of its opinion in the *Lynch* case, the British-Mexican Claims Commission of 1926 declared:

"A consular certificate is a formal acknowledgment by the agent of a sovereign State that the legal relationship of nationality subsists between that State and the subject of the certificate. A consul is an official agent working under the control of his Government and responsible to that Government. He is as a rule in permanent touch with the colony of his compatriots who live in the country to which he is assigned, and he is, by virtue of his post as Consul, in a position to make inquiries with respect to the origin and antecedents of any compatriot whom he registers. He knows full well that the registration of a compatriot entitled to all the rights of citizenship is a step which imposes serious obligations upon the State which he serves. That circumstance in itself is an inducement to him to see that the registration must be attended to with great care and attention." *Decisions and Opinions*, p. 22.

It added, however, that consular registrations might be carelessly made and were of course subject to rebuttal. See *infra*, p. 154.

⁵⁷ *Schneider* case, Opinion of Commissioner Wadsworth, IV ms. *Opinions* 323-324; (award of \$500 by Umpire Thornton, VII ms. *Opinions* 400); *Garay* case, VI ms. *Opinions* 265.

⁵⁸ *Esteves* case, Ralston's Report (1904) 922-923.

⁵⁹ *Lynch* case, *Decisions and Opinions*, pp. 20-23; *Welbanks* case, *Further Decisions and Opinions*, p. 28.

⁶⁰ *Pinson* case, *Jurisprudence de la Commission franco-mexicaine des réclamations*, pp. 32-56.

⁶¹ *Klemp* case, 24 A.J.I.L. 610 (1930). The President in refusing to accept consular certificates as sufficient said that they only established nationality for purposes of statistics, of complying with the law of military service, of paying income taxes, of proof of nationality for the use of the national state in determining questions of protection, etc. *Ibid.* 621-622.

⁶² *Massetto* case (unpublished), cited in Feller, *Mexican Commissions*, p. 274.

⁶³ *Religious Properties* case (Gt. Britain, France and Spain v. Portugal), July 31, 1913, *Compromis, Protocoles des Séances et Sentences*, etc. (The Hague, 1920) 75-76.

⁶⁴ "The Commission has frequently had occasion to consider testimony furnished by consular officers. Generally speaking such testimony should be

by a consul of a person as a citizen in a matter not requiring a specific investigation of citizenship is not sufficient.⁶⁵

The testimony under oath of one or more of the witnesses to the naturalization proceedings to the fact of naturalization constitutes adequate secondary evidence.⁶⁶ These and the preceding cases indicate what appears to be a sound test which any secondary evidence should meet before being accepted, namely, that there should be adequate assurance that the person testifying has first hand knowledge of the naturalization, or that he has had occasion to examine the record or the certificate of naturalization for the particular purpose of ascertaining the person's citizenship. In pursuance of this test passports would be acceptable if the regulations controlling their issuance provide that adequate proof of naturalization be made by the exhibition of the certificate of naturalization or a copy of the court record, or some satisfactory substitute if these have been lost or destroyed.

Section 48. Nationality Through Birth. Generally speaking, the "best evidence" of citizenship acquired through birth *jure soli* is an authentic copy of the record of birth in the Register of Birth, or a birth certificate, at least in countries where such registry is required by law. The chaotic condition, or the complete absence of official records of births in this country and in some other countries, until recent years, has made it impossible or extremely difficult in many cases to obtain such primary evidence. To let in secondary evidence in such cases, it is sufficient, as a rule, to establish that an official record of birth is not available because not required by law to be kept at the time of the birth of the claimant,

valuable. It is the important duty of officials of this character to search out and report facts to their governments. However, their testimony must of course be considered in the light of tests applicable to witnesses generally, the tests as to a person's sources of information and his capacity to ascertain and his willingness to tell the truth. The Commission has considered reports of consuls in the light of those tests, giving weight to those which have revealed the ascertainment of facts which opportunity and effort have made possible and of course attaching little importance to reports based on scanty information." *Kling* case, *Opinions* (1931) 36, 47. Accord: *Youmans* case, *Opinions* (1927) 150, 152; *Kalklosch* case, *Opinions* (1929) 126, 128.

⁶⁵ *Brockway* case (United States v. Mexico), July 4, 1868, III Moore's *Arbitrations* 2534; *Gilmore* case (United States v. Costa Rica), July 2, 1860, *ibid.* 2539.

⁶⁶ *Dantin* case (United States v. Mexico), July 4, 1868, Opinion of Commissioner Wadsworth, III ms. *Opinions* 417 (claim disallowed by Umpire Thornton on the merits because of insufficient evidence, IV ms. *Opinions* 55). In the *Rozas* case before the United States-Spanish Mixed Claims Commission of 1871, a witness produced in court at the time of the claimant's naturalization was permitted to testify before the Commission to show that the claimant had been naturalized as an honorably discharged soldier of the Civil War on a short term of residence rather than on a five year residence (which he had not had) as shown by the court record produced before the Commission. Count Lewenhaupt, umpire, held no fraud had been practiced on the Court. Decision, Feb. 22, 1883, *Record* (1871), vol. 16, No. 69. The Spanish Arbitrator vigorously expressed a contrary view. "Opinion of the Arbitrator in behalf of Spain," Nov. 5, 1881, *ibid.*

or because of the loss or destruction of the record. However, there has been a considerable divergence of views among Commissions both as to the propriety of the admission of secondary evidence of birth, and the circumstances warranting such admission. To a certain extent, it may be said that Commissioners from civil law countries where the civil register has long been an established institution of great importance and prestige, have tended to insist on strict requirements as to the production of primary evidence, while those from other countries, such as the United States and England, have been much more liberal in the admission of secondary evidence.

In a few instances Commissions have gone so far as to hold that nationality must be established in accordance with the method prescribed by the municipal law of the country whose nationality is claimed.⁶⁷ This in some cases would exclude anything but proper proof of an entry in the Civil Register. As pointed out by Feller, such a requirement rests on a confusion between substance and procedure. As he says, "it is not the entry in the Register which creates the status of nationality" but "the fact of birth within the territory" or abroad of a national of a country following the rule of *jure sanguinis*.⁶⁸ It is proof of the fact of birth in which an international tribunal is interested, and no restriction on the means of proof provided in the municipal law of one of the parties can properly be invoked to exclude available evidence, provided it measures up to certain generally accepted standards.

While there would seem to be no objection to a rule requiring that secondary evidence be accepted only after a showing that the record of the registry of the birth has been lost or is not available, such a rule is not always strictly applied. Such a rule was given application with reference to certain affidavits submitted by the United States in the opinion of the United States-Mexican Special Claims Commission of 1923 in the *Santa Isabel* cases. The Commission said, after stating the rule:

"(i) That in order that the affidavits presented in the 'Case of Santa Isabel,' which are nothing more than *ex parte* declarations . . . could have in their favor a legal presumption, as claimed by the American Agent . . . it would be necessary previously to cite a law, convention or rule which elevated the said affidavits to the rank of legal presumption. And as no such law has been cited, nor is there in the Convention, nor in the Proceedings any provi-

⁶⁷ *Russell* case (United States v. Mexico), Sept. 10, 1923, separate opinion of Commissioner Roa, *Opinions of Commissioners, 1926-1931*, pp. 44, 110; *Klemp* case (Germany v. Mexico), March 16, 1925, 24 A.J.I.L. 610 (1930). See also *Expropriated Religious Properties* case (Gt. Britain, France and Spain v. Portugal), July 31, 1913, *Compromis, Protocoles des Séances et Sentences*, etc. (The Hague, 1920) 24, 75-76.

⁶⁸ *Mexican Commissions*, p. 273.

sions upon this particular, it can not be accepted that the 'affidavits' have the probatory force which the distinguished American Agent attributes to them."⁶⁹

The British-Mexican Claims Commission of 1926 and the United States-Mexican General Claims Commission of 1923 accepted baptismal certificates without requiring proof of inability to produce birth certificates.⁷⁰ The latter commission said in its opinion in the *Parker* case that ". . . while ordinarily it is desirable that certificates of registration of births, which are usually contemporaneous with the fact of birth, should be produced when practicable in support of a claim of nationality by birth, or the absence of such certificate explained, it by no means follows that proof of birth cannot be made in any other way."⁷¹

In his separate opinion in the *Cameron* case before the British-Mexican Commission, the British Commissioner held that consular certificates and baptismal certificates were equally admissible with birth certificates as secondary evidence. The latter, he said, was secondary evidence in England as the Register of Birth was the only primary evidence of the place and time of birth.⁷² Consular certificates are acceptable as evidence of citizenship through birth on conditions analogous to those stated above with reference to citizenship through naturalization.⁷³ That is, they are acceptable if the consul at the time of registration required the applicant to exhibit satisfactory proof of the time and place of his birth.⁷⁴ In view of the similarity in the general prerequisites to their issuance, passports would seem to be entitled to a weight equal with that accorded to consular certificates, but their acceptability as evidence

⁶⁹ "*Casos de Santa Isabel*," *Alegato de los Estados-unidos mexicanos*. Expediente numero 449, pp. 47, 62, translation.

⁷⁰ *Lynch* case (Gt. Britain v. Mexico), Nov. 19, 1926, *Decisions and Opinions*, pp. 20, 22; *Renaud* case, *ibid.*, *Further Decisions and Opinions*, pp. 114, 115; *Solis* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1929) 48, 50.

⁷¹ *Opinions* (1927) 35, 37-38.

⁷² *Decisions and Opinions*, pp. 38-39. The Commissioner declared: "In England, as elsewhere, the rule requiring the best evidence of the fact to be proved prevails, and secondary evidence is only admissible where the primary or best evidence is inaccessible."

⁷³ *Supra*, pp. 151-152.

⁷⁴ Nielsen has given an impressive statement of this principle in his opinion in the *Levenson* case in the Turkish Claims Settlement: "When a consular officer is required by the law of his country to examine into the question of citizenship before registering an applicant, and when his action is subject to review by authorities of his government, it can probably be said that the determination of the question of nationality is made by the best expert authority with respect to the law on that subject. Authorities dealing with the matter may be said to act in a quasi-judicial capacity, even though of course judicial authorities may in any given case have the last word in such matters. When a consular certificate—one not made solely for the purpose of the presentation of the claim—is presented to a commission, the commission assuredly has before it a very authoritative pronouncement of a judicial character." Nielsen's Report (1937) 533. See also the *Dimitroff* and *Constantinidi* case, *ibid.* 242.

of citizenship does not appear to have been discussed in the cases.⁷⁵ Transcripts from the family bible may be accepted when no better evidence is available, providing due assurance is provided of the authenticity of the transcript.⁷⁶ Affidavits by persons having personal knowledge of the birth of the applicant are customarily accepted by the Department of State in support of applications for passports if a birth register is not available, and have been accepted in international tribunals.⁷⁷ Affidavits of persons having intimate acquaintance of long standing with the claimant, but not personal knowledge of the birth, may be accepted and given some weight in the absence of other evidence.⁷⁸ Proof of the holding of

⁷⁵ See Ralston, *Law and Procedure* (1926) 173-179; *ibid.*, Supplement (1936) 81-84; E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, 1916) 488-495, 517-526. With regard to the establishment of the national status of its citizens abroad, the United States has insisted upon its passports being accepted as *prima facie* evidence of citizenship.

⁷⁶ *Munroe* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1929) 314, 316. See argument of the United States against the admissibility of such a record in the *Trook* case before the United States-British Mixed Claims Commission of 1871, the United States asserting that to be made competent evidence "at all" the record "should have been produced before a commissioner and identified by a witness on notice and with an opportunity for cross examination." "Argument for the United States," p. 2, *Memorials, Demurrers*, etc. (1871), vol. V, No. 58.

⁷⁷ "66 . . . If birth and baptismal certificates are not obtainable, an affidavit of the parent or of the physician, nurse, or midwife who attended the birth, or the affidavit of a reputable person having sufficient knowledge to be able to testify as to the place and date of the applicant's birth may be accepted. A person who did not attend the birth but who testifies concerning the place and date of the applicant's birth should state briefly how and through what source the knowledge was acquired." *Passport Regulations, Rules governing the granting and issuing of passports in the United States*, revised to March 31, 1938, Executive Order No. 7856, April 2, 1938, Department of State Publication 1165 (Washington, 1938). These regulations are also printed in the *Federal Register*, April 2, 1938, vol. 3, No. 65.

"From one point of view an affidavit sworn by a father concerning the birth of his child has more value than the statement he may make to the Registrar of Births, since the latter statements are not made upon oath." *Kidd* case (Gt. Britain v. Mexico), Nov. 19, 1926, *Decisions and Opinions*, pp. 50, 51. See also the *Solomon* case (United States v. Panama), July 28, 1926, in which the United States relied upon an affidavit by the mother of the claimant as to the place of his birth and time of his arrival in the United States, having produced in evidence the certificate of naturalization of his father. Hunt's Report (1934) 457, 461-462.

In the *Dyches* case, the United States-Mexican General Claims Commission accepted as sufficient proof, in the absence of circumstances contradicting them, "affidavits by persons who are in the best position to know them [the claimants] through their ties of relationship." *Opinions* (1929) 193, 195-196. Accord: *Hatton* case, *ibid.*, *Opinions* (1929) 6; *Corrie* case, *ibid.*, *Opinions* (1929) 133.

⁷⁸ With reference to affidavits of three persons "who could not have positive information with respect to the fact of his [the claimant's] birth," the United States-Mexican General Claims Commission of 1923 said in its opinion in the *Parker* case: ". . . the affidavits of the claimant himself, his brother, and his friend, are clearly admissible in evidence in this case. Their evidential value—the weight to be given them—is for this Commission to determine and in so determining their pecuniary interest and family ties will be taken into account." *Opinions* (1927) 35, 36-37.

In the *Park* case before the United States-British Mixed Claims Com-

an office or the exercise of a privilege limited to citizens has been accepted in some cases as satisfactory evidence of citizenship.⁷⁹ However, proof of voting may not in itself be sufficient, although it may be valuable as collateral evidence.⁸⁰ Certification of the citizenship of the claimant by a high officer of the state, such as a governor, has been held sufficient but certification by a minor officer rejected.⁸¹

The controlling principle which should be applied in testing all such secondary evidence is similar to that suggested with reference to citizenship through naturalization, namely, that the evidence indicates that primary evidence of citizenship has been exhibited to a competent official, or that the witness whose evidence is accepted speaks with personal knowledge of the fact of birth. No evidence speaking with authentic or persuasive force of the fact of birth should be disregarded, although that which originates from something less than direct knowledge or primary evidence may not be sufficient in itself, without corroboration, to establish the status of the claimant.

Section 49. Maps as Evidence.⁸² The principles applicable to the use of maps in international arbitral proceedings constitute a collateral rather than a principal part of the "best evidence" rule as defined in the foregoing sections. Neither parties nor tribunals have proceeded upon the theory that only the "best" maps, if available, may be presented and admitted in proof of the existence

mission of 1871, the United States objected to three affidavits as being insufficient proof of nationality, each affiant having sworn that to the best of his "knowledge, information and belief" he took the decedent "to have been of English birth and parentage, and from his own declarations a subject of Her Majesty's Kingdom of Great Britain." "Argument for the United States," p. 3, *Memorials, Demurrers, etc.* (1871), vol. 2, No. 29.

⁷⁹ *Archuleta* case (United States v. Mexico), Sept. 8, 1923 (holding public office, legislative office, Colorado), *Opinions* (1929) 73, 75; *Deutz* case, *ibid.* (service on jury), *Opinions* (1929) 213, 214.

The Anglo-Chilean Tribunal of 1894-1896 accepted as sufficient proof of citizenship, evidence of ownership of an English ship, as the Merchant Shipping Act of Aug. 10, 1854, Article 18, confirmed by the Merchant Shipping Act of 1894, provided that only nationals could own ships registered under the English flag. *Dickie* case, *Reclamaciones* (1894-1896), vol. I, pp. 64-74. The Chilean Commissioner dissented from this conclusion. For the comment of the Chilean Agent concerning the decision, see *Informe del Agente de Chile* (Santiago, 1896) 40.

⁸⁰ *Gatler* case (United States v. Mexico), July 4, 1868, VII ms. *Opinions* 416, 417; *Pugos* case, *ibid.*, III ms. *Opinions* 71; *Paloney* case, *ibid.*, II ms. *Opinions* 391; *Sharpe* case (United States v. Gt. Britain), May 8, 1871, Hale's Report (1874) 15; *Deutz* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1929) 213, 214. In the *Deutz* case, the Commission said: "... there is further evidence to show that during a long period of time they have been residents of the United States and that they have exercised the privilege of voting at various elections and of serving on several juries. The Commission is of the opinion that this sufficiently established the American citizenship of the claimants." *Ibid.* 214.

⁸¹ *Garay* case (United States v. Mexico), July 4, 1868, VI ms. *Opinions* 265; *Warner* case, *ibid.* 251; *Melendez* case, *ibid.* 353.

⁸² For a discussion of maps as hearsay, see *infra*, sec. 87.

of a given boundary. Parties have frequently employed a strategy, in fact, apparently based upon the hope of overwhelming the tribunal by sheer force of numbers. Tribunals, on the other hand, have admitted maps indiscriminately, rarely stating that only "primary," or "original," or "official" maps would be considered acceptable, if available. They have, however, probably applied severer tests in evaluating maps than almost any other kind of evidence. This is due to the fact that maps are in most instances, at best, secondary evidence, and frequently hearsay in character. Consequently, although the "best evidence" rule is not applied strictly to maps, they constitute one of the best instances of a distinction between primary and secondary evidence, and of the consequences attaching to such a distinction.

Maps, says Sir Travers Twiss "are but pictorial representations of supposed territorial limits, the evidence of which must be sought for elsewhere."⁸³ It is only in the occasional instances in which maps are made an integral part of the agreement to which they are attached, the boundary described in the agreement being marked on the map, or in which certain maps are adopted as the basis of an agreement, or designated as official maps, that maps may be said to assume the character of primary or original evidence. In such cases the "supposed territorial limits" may be sought for in the map itself. A map of this character will take precedence over any other maps which may be introduced as evidence, and will be accepted as the best source collateral to the text of the treaty itself for the determination of the boundary.

Even in these instances the maps can seldom, if ever, be taken as conclusive evidence in the determination of disputes which may arise concerning the location of the boundary. A classic example of this may be found in the case of Melish's map, adopted in Article III of the treaty of February 22, 1819, between the United States and Spain as the basis of the boundary west of the Mississippi river. This article in defining the boundary provided, in part, that it should follow "the course of the Rio Roxo, westward, to the degree of longitude 100 west from London and 23

⁸³ "Some maps have a special significance quite distinct from that which may attach to them when considered as merely expressing the personal views of their authors: they are maps which bear some special relation to treaties; or which have been made the subject of comment by Governments in their diplomatic correspondence or State papers; or which have, in some measure, obtained the official sanction of interested Authorities. . . .

"On the other hand, maps perform the function of pictorially expressing the views of the particular geographers or map makers who may have been instrumental in bringing about their publication. They furnish us, therefore, with the opinions of a particular class of experts; and the value of this kind of testimony depends largely upon the special circumstances of each case." Severo Mallet-Prevost, "Report upon the Cartographical Testimony of Geographers," *Venezuela-British Guiana Boundary Arbitration*, February 2, 1897, *The Counter Case of the United States of Venezuela*, vol. 2, Appendix No. 6 (New York, 1898) 267.

from Washintgon," and concluded "the whole being laid down in Melish's map of the United States published at Philadelphia, improved to the first of January, 1818."⁸⁴ In fact, it transpired that the 100th meridian of longitude was located on Melish's map more than one hundred miles farther west than its correct astronomical location. The Supreme Court in the case of the *United States v. Texas* being called upon to decide whether the contracting parties had intended to adopt the true astronomical line or that line as laid down on Melish's map, held in favor of the former, saying:

"Undoubtedly, the intention of the two governments, as gathered from the words of the treaty, must control; and that the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained. 1 Kent Com. 174. For that purpose the map to which the contracting parties referred is to be given the same effect as if it had been expressly made a part of the treaty. . . . So far as is disclosed by the diplomatic correspondence that preceded the treaty, the negotiators assumed for the purposes of a settlement of their controversy that Melish's map was, in the main, correct. But they did not and could not know that it was accurate in all respects. Hence they were willing to take it as the basis of a final settlement, the fixing of the line with more precision, and the designating of the limits of the two nations with more exactness, to be the work of commissioners and surveyors, who were to meet at a named time, and the result of whose work should become a part of the treaty. While the line agreed upon was, speaking generally, to be as laid down on Melish's map, it was to be fixed with more precision, and designated with more exactness, by representatives of the two nations."⁸⁵

The Court found its conclusion strongly fortified by the fact that of the numerous maps placed before it everyone from 1819 to 1860 placed the boundary of the state of Texas as following the Red River westward until it crossed the *true* 100th meridian.

In some cases a map may be attached to a treaty, agreement or decision, upon which the boundary described in the text has been marked, but which is not specifically declared to be a part of the agreement. The Permanent Court of International Justice had to consider such a case in its advisory opinion concerning the *Delimitation of the Polish Czechoslovakian Frontier* in which it was called upon to construe the decision of the Conference of Ambassadors of July 28, 1920, defining the boundary, to which was annexed two maps on which the boundary was marked. The Court did not even regard maps of such primary importance as decisive, but said:

⁸⁴ Malloy's *Treaties* 1652.

⁸⁵ 162 U.S. 1, 36-37, 38 (1895).

"It is true that the maps and their tables of explanatory signs cannot be regarded as conclusive proof, independently of the text of the treaties and decisions; but in the present case they confirm in a singularly convincing manner the conclusions drawn from the documents and from a legal analysis of them; and they are certainly not contradicted by any document."⁸⁶

In still other cases in relation to the interpretation of treaties, maps may assume an importance as primary evidence because of their being used by the negotiators of a treaty, although not actually adopted by reference in the text of the instrument. Mitchell's map of 1755 assumed such a role in the dispute which arose between the United States and Great Britain over the identity of the St. Croix river adopted as part of the boundary in Article II of the Treaty of September 3, 1783, because of the fact that it was used by the negotiators. But here the map assumed importance as a point of reference and departure in determining the intent of the negotiators, and as a basis for the evaluation and comparison of other evidence introduced to resolve the question as to which was the true river St. Croix. Since it appeared that, although Mitchell designated the more easterly of two rivers in the region as the St. Croix, there was not "any river then commonly known as the St. Croix," and it consequently became necessary to determine by other evidence what river was intended. Mitchell's St. Croix was abandoned by the Commission set up under Article V of the treaty of November 19, 1794, and the more westerly stream, the Schoodiac, adopted as the boundary.⁸⁷

⁸⁶ Series B, No. 8, p. 33. Maps attached to arbitral awards upon which the tribunal has marked the line described in the text of the award furnish a source of evidence as to the boundary secondary only to the text itself. See for example of such maps the decision of Oct. 20, 1903, of the Alaskan Boundary Tribunal (United States v. Gt. Britain), *Proceedings* (1904), vol. I, pp. 29-32.

⁸⁷ See Moore's *Adjudications*, vol. 1, pp. 6, 62-66; vol. 2, pp. 359, 362-368.

"On Mitchell's map of 1755, which was used by the negotiators of the treaty of peace, and of which a copy is inserted at the beginning of this narrative, the River St. Croix appears as a stream of considerable volume, having its source in a lake called Kousaki and its mouth at the eastern head of what is now known as Passamaquoddy Bay, though on the map the greater part of the bay has no separate designation and appears merely as a part of the Bay of Fundy. To the westward on the same map is another stream called the "Passamacadie" (Passamaquoddy), emptying into a small bay or estuary of the same name. But, while Mitchell's map was correct in representing two streams of some magnitude as falling into the body of water commonly known as Passamaquoddy Bay, it did not give their true courses or positions, nor was there in the region any river then commonly known as the St. Croix. This name originated with the early French explorers, from whose charts it was transferred to later maps, on which it was given first to one stream and then to another; and in all these maps, including that of Mitchell, the topography of the region was inaccurate." 1 Moore's *Adjudications* 6.

"It is true that in some Cases, and on some occasions the Assertion of His Majesty's Agent, that Maps have in themselves but a small Share of

Maps having a so-called official character, that is, issued by some agency of one of the governments concerned, or adopted or sanctioned by it, are frequently invoked as having a significance superior to that of ordinary maps, and agreements sometimes provide that official maps may be used.⁸⁸

evidence, would have a great degree of propriety in it. But where the Case itself grows out of Maps, takes its principal facts from them, and could never have an Idea attached to it but what was drawn from them, there is no considerable degree of force in the Assertion. By the Constitution of this Board, the question before it is defined and limited.

"What River was truly intended by the Name of the River Saint Croix in the Treaty of Peace, is the only question to be decided upon. The Parties who formed the Treaty had no Idea of the Country, but what they derived from Maps. Of course then, the Map of Maps which guided their intentions to a particular Object is of great consequence in the enquiry, respecting what River they intended." "Mr. Sullivan's Remarks on Mr. Chipman's Argument," 2 Moore's *Adjudications* 165.

Under a proposal made by the Agent of the United States at the second meeting of the Commissioners on Sept. 24, 1816, concurred in by the British Agent, there was admitted in evidence "a plan of the Rivers Scoodic and Magaquadavic with their principal branches, including the bay of Passamaquoddy and the adjacent Sea Coast and Islands compiled and formed by order of the Honorable Board of Commissioners appointed in pursuance of the Fifth Article of the Treaty of Amity, Commerce and Navigation between His Britannic Majesty and the United States of America by George Sproule Esquire Surveyor General of New Brunswick, and the survey of Passamaquoddy Bay and Islands, made by Mr. Wright, 1772." The American Agent said that if the map were admitted he would not deem it necessary to move for any further map or survey. *Islands in the Bay of Fundy* case (United States v. Gt. Britain), Dec. 24, 1814, Art. IV, ms. *Journal of the Commission*, pp. 29-30.

"The maps in which ancient conceptions on mountain ranges are applied to unexplored countries, have not the least importance in the tracing of a boundary according to Treaties that have not those maps in view." Argentine-Chilean Boundary Arbitration, April 17, 1896, *Report presented to the Tribunal appointed by Her Britannic Majesty's Government*, etc. (London, 1900), vol. II, p. 556.

⁸⁸ "Art. III. The arbitrator, in announcing his decision, shall do so in accordance with the laws of the recompilation of the Indies, royal cédulas and orders, the decrees of intendentes, the diplomatic documents relating to the demarcation of frontiers, official maps and descriptions, and in general with all the documents which may have been dictated with official character, so as to give the true and correct meaning and effect to the said royal dispositions." Bolivian-Peruvian Treaty of Arbitration respecting Limits, Dec. 30, 1902, Manning, *op. cit.* 334. For an analogous provision, see Honduras and Nicaragua, Treaty of Oct. 7, 1894, Art. II, discussed in Award of the King of Spain, Dec. 23, 1906, 100 Br. For. St. Paps. 1096, 1100.

In the *Misiones Boundary Arbitration* between Argentina and Brazil, under a treaty of Sept. 7, 1889, the tribunal had to consider a previous treaty of Jan. 17, 1751, between Portugal and Brazil delimiting their territories in South America, and a protocol of the same date containing the following warning with reference to the signed map attached to the treaty: "We likewise declare that although according to the information of both courts we hold all things noted in the said map as very probable; admitting also that some of the territories demarcated have not been visited by persons now living, and that others have been taken from the maps of trustworthy persons who have travelled through them, though, perhaps, with little skill to represent them by sketch, on which account there may be some notable variations upon the ground, both in the situations of mountains, and in the origins and courses of rivers, and even in the names of some of them, because it is customary for each nation in America to give them different

Aside from maps of the character described, all maps are secondary evidence of the boundary lines which they purport to portray, and because of their susceptibility to error must be used with extreme caution. One of the principal dangers inhering in the use of maps lies in the fact that they are likely to be accepted by the uninitiated layman as carrying greater weight than documentary portrayal of the same facts. As to geographical facts, there may be at times some justification for such an attitude, depending upon the ability and sources of information of the cartographer, but as to political boundaries they can never be more than a reflection of the sources used by the geographer for determining the location of the boundary on his map.

In other words, map-makers as witnesses should be subjected to the same tests as any other witnesses, the value of their testimony depending entirely upon the character of their sources of information.⁸⁹ "Maps, when they have no conventional or statutory significance, should be regarded merely as representing the opinions of the persons who constructed them," declared Newcombe, J., speaking for a majority of the Supreme Court of Canada in the case of *The King v. Price Bros. and Co., Ltd.* "They furnish at best no adequate proof, and none when it appears that they are founded upon misleading or unreliable information or upon reasons which do not go to establish the theory or opinion represented, and when they have not the qualifications requisite to found proof of reputation."⁹⁰

If maps are based upon careful first-hand investigations and surveys by their makers, they are entitled to great weight as to the geographical facts which they represent. If, however, as ap-

names, or for other reasons: It is the will of the contracting sovereigns, and they have agreed, that any variation there may be shall not stay the course of the execution, but that it shall proceed as, in accordance with the treaty, the mind and intention of their majesties is manifested in the whole of it, and more particularly in Articles VII., IX., XI., and XXII., according to which the whole shall be punctually executed." II Moore's *Arbitrations* 1998-1999.

For further discussion of so-called official maps, see Opinion of Lord Alverstone in Alaskan Boundary Tribunal, *Proceedings* (1904), vol. I, p. 34, and opinion of American members, *ibid.* 61. For discussion during the oral argument, see *ibid.*, vol. VII, pp. 781ff.

⁸⁹ "But it is said, the maps of the early explorers of the river and the reports of travellers, prove the channel always to have been east of the island. The answer to this is, that evidence of this character is mere hearsay as to facts within the memory of witnesses, and if this consideration does not exclude all books and maps since 1800, it certainly renders them of little value in the determination of the question in dispute. If such evidence differs from that of living witnesses, based on facts, the latter is to be preferred. Can there be a doubt that it would be wrong in principle, to dispossess a party of property on the mere statements—not sworn to—of travellers and explorers, when living witnesses, testifying under oath and subject to cross-examination, and the physical facts of the case, contradict them?" *Missouri v. Kentucky*, 11 Wallace 395, 410 (1870).

⁹⁰ [1925] D.L.R. 595, 609.

pears to be too frequently the case, they are copied from existing maps, they are entitled, at best, to no more credence than ordinary hearsay evidence.⁹¹ With reference to political facts, however, maps are chiefly valuable for their "pictorial representation" of those facts as laid down in official documents.⁹² The documentary sources furnish the "best evidence," it is needless to say, of the facts portrayed by the map, except in the cases in which the specific map is attached to and made an integral part of the agreement.⁹³

⁹¹ Judge Huber declared in his award in the *Palmas Island* case (United States v. Netherlands), Jan. 23, 1925:

"Any maps which do not precisely indicate the political distribution of territories, and in particular the Island of Palmas (or Miangas) clearly marked as such, must be rejected forthwith unless they contribute—supposing that they are accurate—to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not merely referred to already existing maps—as seems very often to be the case—but that he has based his decision on information carefully collected for the purpose." *Arbitral Award* (The Hague, 1928) 36.

"The manner in which map-makers so often mechanically copy one another introduced further difficulty into the consideration of cartographical evidence; and the want of system in selecting the maps to be copied adds yet more; atlases often contain different maps of the same territory with very different presentations of it, more particularly as regards the lines of boundary exhibited. This is especially true of atlases prepared about the end of the eighteenth and the beginning of the nineteenth century." *British Guiana-Brazilian Boundary Arbitration, The Argument on behalf of the Government of His Britannic Majesty*, cited in *In the Privy Council in the Matter of the Boundary Between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula*, Joint Appendix, vol. VIII, p. 3760.

See also the Arbitral award in the *L'Oeil de la Mer* case (Austria v. Hungary), Sept. 13, 1902, VIII *Rev. de droit int. et de leg. comp.*, 2d Series (1906) 162, 205.

⁹² "A map is primarily a statement of geographical facts, designed in theory to present visually the unvarnished truth. Its purpose is to bring home that truth to the mind through the eye. . . .

"But the map-maker does not stop at this point. He commonly undertakes to do much more—to state political as well as geographical facts. Here again his duty in such case is to reveal the truth, relative to national pretensions or accepted limits and known boundaries. The sources of his information simply differ, however, from those concerning the purely geographical facts. The tests of his accuracy are not in the decrees of Nature, but in those of States. When their claims clash, or are vague or loosely defined, or only partially revealed, the map-maker, however honest, is at best a mere guesser who is incapable of making a scientific representation or picture of more than the scope of national pretensions." *Guatemala-Honduras Boundary Arbitration, The Counter-Case of Guatemala* (Washington, 1932) 341-342.

⁹³ In a memorial of Jan. 11, 1751, presented to the British-French Commissaries appointed under an agreement of July, 1749, to define the boundaries between the colonial possessions of the two countries in North America, the British Commissaries declared: ". . . and, Maps are appeal'd to by us only in answer to the Assertion, that Charts of all Nations confine the Limits of Acadia or Nova Scotia precisely to the Peninsula; for Maps are from the Nature of them a very slight Evidence, Geographers often lay them down upon incorrect Surveys, copying the Mistakes of one another; and if the Surveys be correct, the Maps taken from them, tho' they may show the true Position of a Country, the Situation of Islands and Towns, and the Course of Rivers, yet can never determine the Limits of a Territory, which depend

Contemporary maps, as in the case of documentary evidence, may furnish valuable evidence of names or locations of disputed geographical features or landmarks or of other geographic features upon the basis of which governments have based their action. Such evidence has on occasion been accorded great weight in determining the meaning of an agreement or grant defining limits.⁹⁴ While the multiplication of maps copying each other's mistakes can have little weight, considerable importance may be attached to the unanimous testimony of a number of geographers over a long period of time.⁹⁵ Hyde has appropriately observed, however, with reference

entirely upon authentic Proof; and the Proofs in that Case, upon which the Maps should be founded to give them any Weight, would be themselves a better Evidence, and therefore ought to be produced in a Dispute of this Nature, in which the Rights of Kingdom are concerned." *Memorial of the English and French Commissaries, Nova Scotia* (London, 1755), vol. I, p. 73, quoted in *In the Privy Council In the Matter of the Boundary Dispute between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula*, Joint Appendix, vol. VIII, pp. 3755-3756, and in Chipman's Supplemental Argument in the *Saint Croix River Arbitration*, 2 Moore's *Adjudications* 27. For French text, see *Mémoires des Commissaires du Roi et de ceux de sa Majesté Britannique* (Paris, 1755), vol. I, p. lxxi.

"Great Britain . . . holds . . . that, of itself, a map is of no value as evidence at all. . . . [It maintains] that each map, like each document, must be investigated carefully and verified by contemporary evidence. . . .

". . . The true position is that taken by Great Britain, viz., that each map is to be considered by itself as a part of the documentary evidence of the period to which it belongs." *British Guiana-Brazilian Boundary Arbitration, The Argument on behalf of the Government of His Britannic Majesty* (London, 1904) 87.

⁹⁴ In determining whether a grant made in 1693 by King Louis XIV of France of a certain Lake Metis, which on modern surveys proved to consist of three Lakes, included all three lakes, the Judicial Committee of the Privy Council considered as decisive the unanimous testimony of cartographers from the earliest map, 1755, down to 1870, that there was only one Lake Metis. After referring to these early maps, the Court declared: "The mere fact that this lake is geographically more accurately described as a separate lake than as a section of 1 lake has very little significance in view of the established repute for nearly 2 centuries of the 3 bodies of water as forming 1 lake, and bearing 1 name. It is, besides, extremely unlikely that the original applicants for a concession would have sought to obtain the lake and land around it which was most remote from the coast and therefore most difficult to settle." *Price Bros. and Co., Ltd. v. The King*, [1926] 3 D.L.R. 642, 645, 648. See also opinion of Lord Alverstone in the *Alaskan Boundary* case, *Alaskan Boundary Tribunal, Proceedings* (1904), vol. I, p. 34.

⁹⁵ See oral argument of Mr. Taylor, *Alaskan Boundary Tribunal, Proceedings* (1904), vol. VII, pp. 601-602; *British Guiana-Brazilian Boundary Arbitration, The Argument on behalf of His Britannic Majesty* (London, 1904) 86-89; *Honduran-Nicaraguan Boundary Arbitration*, Award of the King of Spain, Dec. 23, 1906, 100 Br. and For. St. Paps. 1100-1101; *Costa Rican-Nicaraguan Boundary Arbitration*, Award of General E. P. Alexander, Sept. 30, 1897, V Moore's *Arbitrations* 5077.

". . . the fact that throughout a long series of years, and until the present dispute arose, all the maps issued in Canada either supported or were consistent with the claim now put forward by Newfoundland, is of some value as showing the construction put upon the Orders in Council and statutes by persons of authority and by the general public in the Dominion." *Canada-Newfoundland Boundary Dispute in the Labrador Peninsula, Opinion of the Judicial Committee of the Privy Council*, 137 L.T.R. 187, 199 (1927).

In its *Memorandum* in the *Palmas Island* case the United States asserted that it had examined over 1000 maps dating from the years 1599-1898,

to this matter that "it may be doubted . . . whether such a series of maps, however numerous, necessarily proves that the boundary which they unite in prescribing is necessarily the correct one, to be accepted as the juridical basis of the proper frontier, especially when they are contradicted by trustworthy evidence of title."⁹⁶

It will be apparent from the foregoing, that maps falling short of the status of primary evidence must be scrutinized with extreme care when advanced in support of a claim to sovereignty over a given territory. In every case the source of the cartographer's information is a matter of primary importance. If the map is put forward as evidence of contemporary reputation as to the names or location of certain topographical features, it is important to know whether the map portrays the views of the cartographer only, or whether it is based on the opinions or surveys of others. If it is put forward as evidence of the location of a boundary as defined in existing conventional and statutory law with reference to fixed geographical features, it is essential to know the sources from which the cartographer draws his information as to political facts.⁹⁷ In the former case inaccuracies as to geographical facts may not invalidate the map, in the latter it is a fatal defect. The value of maps as secondary evidence, in other words, depends peculiarly upon their intrinsic merits considered in the light of the purpose for which they are introduced. If properly used they furnish helpful corroborative evidence, but it is seldom safe to accept them as independent evidence of the documentary political facts which they purport to reflect.

and that only three had been found "which might possibly be considered to give some color to the Dutch claim of sovereignty to the island." Pp. 25-26. Judge Huber, sole arbitrator, declared in his award: "If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be." *Arbitral Award* (The Hague, 1928) 36-37.

"Considering that in order that importance may be given in a matter of sovereignty (propriedad) to the authority of geographers it is necessary that all or a great part be unanimous and agree in determining the nationality of a given territory, and this circumstance being absent in the present case, other titles of more force and validity than the opinion of geographers is required." *Aves Island* case (Netherlands v. Venezuela), Aug. 5, 1857, Award of the Queen of Spain, June 30, 1865, V Moore's *Arbitrations* 5038, translation.

⁹⁶ "Maps as Evidence in International Boundary Disputes," 27 A.J.I.L. 311, 316 (1933).

⁹⁷ "Those maps which stand next in point of numbers, viz.: those which follow the D'Anville line, have just the authority which D'Anville had, and no more, and there is no record that D'Anville based his line on any sound information: his southern boundary, indeed, is opposed to the facts both of geography and history. The last type of line, which, on a number of maps, is carried along an imaginary range which is presumed to form the watershed falls to the ground at once, for the simple reason that there is no such range as that which the map portrays." *British Guiana-Brazilian Boundary Arbitration, The Counter Case on behalf of the Government of His Britannic Majesty* (London, 1903) 137-138.

EX PARTE EVIDENCE

Section 50. Ex parte Evidence Not Under Oath. International tribunals have been compelled to lean heavily upon *ex parte* evidence for the elucidation of questions presented for their decision. Such evidence is made up largely of affidavits, but in some cases in which no other evidence was available unsworn evidence of various kinds has been submitted by the parties and admitted by the tribunal.⁹⁸

Such evidence must of necessity be relied upon with great caution, and is seldom accepted as sufficient to establish a fact in issue, in the absence of corroborating evidence. In the *Studer* case before the United States-British Mixed Claims Commission of 1910, in which claim was made "for the repeated invasion and ultimate destruction of cessionary and property rights," the principal evidence consisted of a long statement by the original claimant, prepared and filed with the Department of State some twenty years after the events giving rise to the claim. In disallowing the claim for lack of adequate evidence, the Commission after declaring that there was hardly a statement of fact in the record which was not disputed, and that the number of facts definitely ascertained or admitted were almost negligible, said with reference to this statement, and another submitted at the same time to the British Acting Governor of the Straits Settlement:

"The Tribunal sees no reason to doubt Studer's absolute sincerity and perfect good faith from beginning to end: . . . Nevertheless where a case rests so largely upon *ex parte* statements prepared many years after the event by the party in interest, for the express purpose of presenting his claim in the best possible light, allowance must be made for infirmities of memory as well as for a claimant's natural sense of grievance amounting sometimes almost to an obsession. . . . Neither of these statements possesses the solemnity of a sworn declaration. They are merely the attempts of an individual who truly believed that he had been wronged, and perhaps had been unjustly treated, to recall and set down acts and circumstances of long ago. In effect the Government of the United States asks the Tribunal to accept these statements without substantial corroboration and to found its judgment upon them. Without regarding many, if not most, of the essential facts as duly established in this way, it is difficult to see how any judgment could be rendered; and even so, much would be left to inference and conjecture."⁹⁹

⁹⁸ "They [international tribunals] always exercise great latitude in such matters (Meade's case 2 Ct. Claims R. 271), and give to affidavits, and sometimes even to unverified statements the force of depositions." *Caldera* cases, 15 Ct. Cls. R. 546, 606.

⁹⁹ Nielsen's Report (1926) 548, 552.

Tribunals have, however, on occasion based awards solely upon unsworn evidence when the person from whom it emanated appeared to be entitled to credence and to be speaking from personal knowledge of the facts. For example, Umpire Duffield made an award in the *Plantagen Gessellschaft* case before the German-Venezuelan Mixed Claims Commission of 1903, the only evidence consisting of an unsworn "letter or statement" by the manager of the hacienda and certain unauthenticated receipts.¹⁰⁰ Likewise, in the *Lasry* case, the American-Venezuelan Commission of 1903, although declaring itself unable to accept the uncorroborated estimate of the plaintiff that his loss amounted to \$15,000, made an award of \$2,000 upon the basis of two letters from the claimant to the Department of State, and two statements by residents of the town in which the claimant's property was seized. The Commission said that undoubtedly greater weight would be accorded to "legal testimony presented under the sanction of an oath administered by competent authority," than to "unsworn statements contained in letters, informal declarations, etc.," but that the latter were "under the protocol entitled to admission and such consideration as they may seem to deserve."¹⁰¹

In the *Walker* and *Levek* cases before the United States-Chilean Mixed Claims Commission of 1897, the Chilean Government sought to draw what seems to be a proper distinction, distinguishing between official communications of higher officers of the state, produced *ex parte*, and similar communications of private individuals.¹⁰² At least such official communications should ordi-

¹⁰⁰ Ralston's Report (1904) 631-632. Cf. *infra*, sec. 75.

¹⁰¹ *Ibid.* 37-38. See also *De Lemos* case (Gt. Britain v. Venezuela), Feb. 13, 1903, *ibid.* 319, 321 (declarations by two witnesses under oath held to be invalid, but nevertheless admitted, the evidential value to be "left to the decision of the tribunal"); *Parker* case (United States v. Mexico) Sept. 8, 1923, *Opinions* (1927) 35, 37 ("an unsworn statement may be accepted in evidence, but the weight to be given it will be determined by the circumstances of the particular case").

In its *Answer* in the *Landreau* case (United States v. Peru), May 21, 1921, the Peruvian Government objected to documents purporting "to be thirteen letters from J. Theophile Landreau to Celestin Landreau" on two grounds: "(1st) their authenticity as the actual letters of J. Theophile Landreau is insufficiently shown, and (2d) even if written by J. Theophile Landreau they are self-serving and *ex parte* statements and not of sufficient definiteness of formality to effect a transfer of any property rights." It further objected to two letters from the American minister at Lima to the Secretary of State reporting the substance of a conversation with President Leguia concerning the claim, characterizing their production as an "attempt to make *ex parte* reports of informal conversations with governmental officials the basis of legal claims against that Government in contradiction of formal expressions of that Government made in the regular course of diplomatic correspondence." Pp. 25, 46.

¹⁰² See *Brief on Behalf of the United States as to the Admissibility and Effect of Affidavits and other Ex Parte Writings*, p. 8, Perry's Report (1901); *Brief of the Agent of Chile in Reply to the Brief of the Agent of the United States on the Question of the Effect of Affidavits*, pp. 21-22, *ibid.* Cf., however, *infra*, sec. 93.

narily be entitled to greater weight than those of private individuals. The fact that the statements made were not verified under oath would not, in general, affect the credibility or value of the official statement, so long as the document produced was duly authenticated as a true copy of the original.

It would seem that the report of an expert, prepared *ex parte* for one government and without the knowledge or participation of the other, may be admitted for the information of the tribunal only as to matters of fact contained in it, and not for expressions of opinion.¹⁰³

Section 51. Affidavits In Anglo-American and Civil Law Procedure. Over no phase of the law of evidence has there been such a divergence of views among jurists and counsel trained in the civil law and in Anglo-American law, participating in international judicial proceedings, as with reference to the propriety of the admission of affidavits and their evaluation as evidence. This is due largely to the fact that affidavits are quite foreign to lawyers accustomed to civil law procedure, there being few provisions concerning affidavits in the codes and statutes of civil law countries.¹⁰⁴ All testimony not taken before the court is taken by deposition under civil law procedure, either before a judge, or some other competent judicial authority. Consequently, the *ex parte* preparation of affidavits by the affiant himself or by his attorney, with a casual verification before some notary public or justice of the peace is likely to strike the civil law lawyer as highly irregular.

¹⁰³ See discussion during the course of the oral proceedings in the *British Guiana-Venezuela Boundary Arbitration* of a report prepared by an expert for a Commission appointed by the United States to study the boundary, and printed by Venezuela in its written pleadings. *Proceedings* (1899), vol. I, pp. 61-62, vol. IV, pp. 883-887. For a discussion of experts and expert enquiries see *infra*, secs. 76, 77.

¹⁰⁴ Attention may be invited to the following new provisions contained in the third and fourth paragraphs of Art. 377 of the German Code of Civil Procedure of 1933:

"If the object of the testimony is information which the witness would probably furnish on the basis of his books or other documents, the Court may order that the witness need not appear at the hearing, provided that he furnish a written answer to the questions under assurance of its correctness in lieu of an oath.

"The same may be followed in other cases in so far as the Court, according to the circumstances, in particular under consideration of the nature of the questions, considers a written declaration of the witness as sufficient and the parties are in accord therewith." Translation.

During the course of the oral proceedings in the *Norwegian Claims* case (United States v. Norway), June 30, 1921, counsel for Norway stated that it was only recently that the practice of using sworn statements in Norway had been developed. *Proceedings* (1921) 21.

"On sait la place que ce mode de preuve a prise dans tous les systèmes juridiques modernes. Les législations fiscales du continent, basées avec l'impôt sur le revenu, sur les déclarations du contribuable, ont adopté l'affidavit et assoient l'impôt sur la déclaration solennelle du contribuable." Witenberg, "La théorie des preuves devant les juridictions internationales," *Académie de droit international, Recueil des Cours*, 1936, II, vol. 56, p. 81.

The administration of an oath in civil law procedure is generally the prerogative of a judicial officer, who as a rule will administer the oath only to witnesses testifying in proceedings pending before him. As a rule, a notary cannot administer an oath with reference to a written statement of a party who comes to him solely for that purpose. In the procedure of some civil law countries a certain form of written statement is used to which a somewhat greater probative value is given than to ordinary statements. These are "assurances in lieu of an oath"; still they are statements not made before any official, and not made under oath. Their use is limited to special proceedings, principally *ex parte* proceedings where by statute it is sufficient for the parties, instead of proving their allegations, to "make them credible."¹⁰⁵

To the common law lawyer on the other hand, the affidavit is a familiar instrument of legal proof. Even at the common law, however, affidavits, with two or three rare exceptions, were inadmissible as evidence. The general principle of necessity has prompted the sanctioning by statute of "the use of affidavits in various classes of cases where serious and frequent inconvenience would be caused by requiring the calling of witnesses in court, and where under the special circumstances there is little reason to fear false testimony and little need for the searching process of cross-examination."¹⁰⁶ Affidavits are also widely used in common law countries for extra-judicial purposes. Consequently, the common law lawyer is well accustomed to the use of affidavits, but he may nevertheless object to their indiscriminate use in international proceedings because of his confirmed belief in the superior virtue of evidence produced under cross-examination.¹⁰⁷

¹⁰⁵ See, for example, Art. 294 of the German Code of Civil Procedure (1933). Punishment for false statements made in these "assurances in lieu of an oath" is considerably more lenient than for a false statement made in testimony under oath. In the former case the penalty is one month to three years imprisonment (Penal Code, Art. 156), while in the latter case the maximum penalty is ten years imprisonment (*ibid.*, Art. 153). There seems to be a tendency in civil law procedure to widen the use of such instruments. To use the term "affidavit" to designate such instruments, as is sometimes done, is inaccurate and misleading.

In Germany notaries are especially authorized to administer an oath with regard to written statements not executed before them where the document is to be used in proceedings in Anglo-American countries.

¹⁰⁶ III Wigmore's *Evidence* 666-672. See also *ibid.* 58-60.

¹⁰⁷ "While under the jurisdictional act of January 20, 1885 (23 Stat. 283), contemporaneous statements and documents have been received as evidence, the court has never extended the rule so as to embrace the admissibility of papers other than those recognized as competent by the rules of law, municipal and international, and the treaties applicable to the case. The proceedings of the high court of admiralty of England have uniformly been refused admission. No opportunity was given France to cross-examine the deponents in preparatorio, and she could not avail herself of any defense she might have had in the English court. She was without notice of the claim for salvage, and in so far as she was concerned the proceedings were *ex parte*." *Vessel Brig "Philanthropist"* case, United States Court of Claims, *Opinions in French Spoliation Cases* (1912) 584.

Section 52. The Same: Procedure in the Taking of Affidavits and Depositions.¹⁰⁸ It is not only the absence of provisions concerning affidavits in civil law procedure that causes civil law jurists to object to their use, but also the contrast in the procedure of the taking of testimony by affidavit and by deposition.

Affidavits have been aptly defined by the Agent of Chile in the Anglo-Chilean Claims Arbitration of 1893 as the "means of proof which consists of a deposition under oath . . . taken outside the judicial proceedings, without the order or the knowledge of the Tribunal, and without the citation of the opposing party."¹⁰⁹ They are characterized by the fact that they are prepared entirely *ex parte* without guidance of the tribunal and usually even without its knowledge.

In contrast to this in civil law procedure depositions are taken before a judge in the presence of the parties. As a great deal of the opposition to the use of affidavits has come from Mexican jurists, the procedure of taking the testimony of witnesses under the Federal Code of Civil Procedure, in force there until recently, may be taken as typical.¹¹⁰ An interrogatory (*interrogatorio de pregunta*) is framed by the party wishing to have a witness examined, and submitted to the judge, and to the opposing party. The latter may, if he so desires, present a counter-interrogatory (*interrogatorio de repregunta*) which is handed to the judge and kept secret by him until the day of the examination. The questions contained in these documents must be drawn in clear and precise terms, and each of the questions and counter-questions must relate to the fact or facts contained in the interrogatory and counter-

¹⁰⁸ For further discussion of the procedure of taking depositions in international proceedings, see *infra*, secs. 68, 73.

¹⁰⁹ *Informe del Agente de Chile* (Santiago, 1896) 47, translation.

"L'affidavit est l'affirmation écrite faite sous serment par l'intéressé ou par un témoin de certains faits ou de l'authenticité de certains documents sur lesquels s'appuie la demande. Il apparaît ainsi comme un mode de preuve a mi-chemin de la preuve écrite et de la preuve testimoniale. Participant à la preuve écrite en ce qu'il amène l'établissement d'un acte destiné à servir de preuve, il participe aussi de la preuve orale en ce que la teneur de l'acte procède de la seule déclaration sous serment de l'intéressé ou du témoin." Witenberg, *L'organisation judiciaire*, *op. cit.* (1937) 255.

For an opinion to the effect that there was intended to be no distinction made in the use of affidavits and depositions before the United States-Spanish Mixed Claims Commission of 1871, see *Jose Garcia de Angarica* case, *Opinion by the Arbitrator on Behalf of Spain*, Dec. 23, 1881, *Record* (1871), vol. 9, No. 17.

¹¹⁰ A revised Federal Code of Civil Procedure was put into effect on Dec. 31, 1931. The principal change in the procedure of taking the testimony of witnesses introduced by the new code is that there are no written interrogatories under it, the questions being formulated orally and directly by the parties. The questions are put to the witnesses by the judge, however, who has full authority to put both to the witness and to the parties such questions as he believes "will conduce to the elucidation of the truth with respect to the points controverted." *Código de Procedimientos Civiles para el Distrito Federal y Territorios*, edited by Raul Berron Mucel (Mexico, 1934), Arts. 356-372.

interrogatory. The judge may pass on the interrogatories, and may suppress such questions as in his judgment are contrary to law or morals. The witnesses are examined under oath, the questions being put to them by the judge, who may put questions in addition to those in the interrogatories, provided that they relate to the facts contained in them. The parties may be present and may assist in the interrogation of the witnesses, but they may not interrupt, nor make other questions or counter-questions than those formulated in the interrogatories. It is only when the witness has already answered a question or has contradicted himself or expressed himself with ambiguity, that the parties can call the matter to the attention of the judge, who may, if he deems it necessary, demand that the witness make a further declaration. A witness is obliged to give with each one of his answers the reasons for what he has said. The witnesses are examined separately, and not in the presence of other witnesses.¹¹¹

Commissioners have disagreed as to the respective merits of depositions taken under these conditions and of affidavits. The question was considered at some length by the Mexican Commissioners of the United States-Mexican Mixed Claims Commission of 1868. In his opinion in the *Capistran* case, Commissioner Zamacoma declared:

“As between the practice of stating the fact in the question, and asking a party under oath, and in the presence of the Judge and a Notary or two witnesses, whether the fact occurred as stated, or if it occurred otherwise, and whether it is wholly or only partially true; and that of the claimants lawyer’s writing down the deposition of the witness, making it to suit himself, and then carrying it and the witness before a Notary public or the clerk of a Court for the witness to sign it there or say that he don’t know how to write, the opinion of the undersigned apart from his respect for the Roman Spanish law cannot but incline to a preference for the former method. Between suggesting an answer and making it to suit the party interested (under the direction of the undersigned) a lover of truth would not be perplexed in making a choice. The interrogatories of the Spanish law, at least leave to the judge making the examination a supervision of the truth of the witnesses’ answer and the care to state what is written, the idea of the witness. The form is

¹¹¹ *Código Federal de Procedimientos Civiles*, copia integra de la Edición Oficial por el Lic. Eduardo Pallares (Mexico, 1922), Arts. 503-532.

Interrogatories of the character described in the text are not generally used in taking the testimony of witnesses in most European countries. There the judge formulates the questions, the parties having the right to ask questions directly or through the judge.

confined to stating the affirmative of the question only when the witness agrees to the details expressed in the question."¹¹²

The principal criticism directed by common law jurists against the procedure of taking depositions is that the questions are largely leading questions, and that the witness is given no fair chance to testify to what he actually knows and believes. With reference to a criticism of this nature, Commissioner Palacio said in his opinion in the *Perez* case:

"What guarantees of veracity can be found in this affidavit, which are not also afforded by the deposition of a witness who being asked about certain facts makes an affirmative answer? If the witness is disposed to answer what may prove beneficial to the interested party, whether true or not, such a purpose can be affected in the manner of an affidavit, the same as in that of a deposition of any other kind.

"The truth is that all depositions of a witness produced by the interested party and not examined by the judge, and cross-examined by a contradictor, is defective; and for this reason the extra judicial depositions or those received *ex parte*, cannot be accepted with so much confidence as those which were taken during the trial and submitted to contradiction."¹¹³

He said further that the forms of proceedings in both countries had certain advantages and disadvantages, that he did not feel bound to respect one more than the other, and that he only paid "attention to the intrinsic elements of certitude exhibited by the proofs." Finally, he concluded that he had "no objection to admit as a proof the affirmative answer of a witness to the questions asked of him and containing a statement of the facts inquired,—if nothing is alleged against the honesty and veracity of the witness,—if the form in which he made his deposition is the usual one established in the country,—if said form has consequently been used in good faith,—and if the statements of the witness are not contradicted by other proofs of better class."¹¹⁴

The contrary view, that is, that depositions or interrogatories should carry no greater weight than affidavits, has perhaps been best stated by Commissioner Jones (British) of the British-Mexican Claims Commission in his opinion in the *Cameron* case. In commenting upon the Mexican Agent's contention that affidavits should be excluded because taken *ex parte* and the witness not subjected to cross-examination, he declared:

¹¹² VI ms. *Opinions* 101, 105 (Claim dismissed by Umpire Thornton, *ibid.* 345-346).

¹¹³ II ms. *Opinions* 109, 114 (Claim dismissed by Umpire Lieber, *ibid.* 119).

¹¹⁴ *Ibid.* 114.

"It appears to me that interrogatories as administered in Mexico should carry not much more weight than the statements of a witness in an affidavit. In nearly all essential respects interrogatories as understood in Mexico and affidavits as understood in England are identical. (1) In both cases the statements of the witness are taken down in writing. (2) They are taken down in writing by officials authorized to do so. (3) Both are written evidence taken down for the information of the Court. (4) Both must be relevant to the issues in the case. The Mexican Agent, in depreciating the value of affidavits, overlooks the fact that they are made before a public official. In England no affidavit can be taken except by Commissioners for Oaths, who are appointed expressly for the purpose and who, as solicitors, are officers of the High Court of Justice."¹¹⁵

The Commission by a unanimous vote overruled the Mexican contention, and admitted affidavits as evidence, stating, however, that they "must and will be weighed with the greatest caution and circumspection."¹¹⁶

Section 53. The Same: Reasons for Use of Affidavits.¹¹⁷ The extensive use of affidavits as a form of evidence in international judicial proceedings is fundamentally a matter of necessity. In many cases no other form of evidence is available. Normal evidence of a documentary character either never existed or because of the long lapse of time since the event has either been lost or destroyed. As for the taking of depositions according to the normal procedure outlined in the preceding section, the practical difficulties involved, including that of expense, renders that quite impossible in a large number of cases. The widespread origins of the cases may virtually prohibit the taking of depositions on notice with both parties present. As an illustration, Nielsen points to the United States-British Mixed Claims Commission of 1910, in which the number of cases was comparatively small, but the cases "respectively based on occurrences on the high seas, and in Hawaii, the Philippines, Cuba, Newfoundland, the Transvaal, the Orange Free State, India, the Fiji Islands, New Zealand, the Malay Peninsula, Sierra Leone, China, England and in several States of the United States."¹¹⁸ Aside from the mechanical difficulties involved and the time which might be consumed in the process, the cost of taking depositions in widely scattered regions would be prohibitive unless they are taken on written interrogatories before a foreign court or judicial officer.

Perhaps the most compelling practical reason for resort to affidavits arises from the long lapse of time between the event and

¹¹⁵ *Decisions and Opinions*, pp. 37, 43.

¹¹⁶ *Ibid.* 33, 35, 36, 48.

¹¹⁷ Cf. *supra*, sec. 5.

¹¹⁸ *International Law Applied to Reclamations*, *op. cit.* 66.

the proceedings. A number of difficulties are presented by this lag in the adjudication of international disputes. One is that the significance of various kinds of evidence could not be foreseen over such a long period of time.¹¹⁹

Then there is the fact that many of the primary witnesses are dead by the time the proceedings take place. A further difficulty is presented by the loss or destruction of original documentary records, the contents of which must be proved, if at all, by the sworn testimony of persons having personal knowledge thereof. This is well illustrated by the problems involved in the proof of nationality, previously discussed.¹²⁰ It is a commonplace of historical research, as well as of judicial proceedings, that as events recede in time it becomes increasingly difficult to recall their outlines through the medium of authentic records.

The very nature of the facts out of which many claims arise makes the matter of proof extremely difficult. Resort to the sworn testimony of witnesses taken out of court may well become the only source of light on the events in question. This is especially true where the claims originate in acts of violence.¹²¹

One further reason for the use of affidavits is that it is sought in this fashion to give an added force and sanction to the testimony

¹¹⁹ "It is of course unthinkable that one should foresee during and since 1917 the protracted and exceptionally unfortunate chain of events which have ultimately necessitated this international arbitration. Not having so foreseen such developments, one could scarcely be expected to accumulate during the passing years and retain until the present time evidence with respect to minor and incidental facts, formal records of which, at the time of their occurrences, would not present to the interested party the importance attached to them today, in retrospect, after the atmosphere of controversy and confusion of ideas has been somewhat clarified.

"The force of this is demonstrated by the fact that the Egyptian Government not only neglected to preserve important evidence available to it but actually destroyed such evidence after intimation of its value was officially given by the Government of the United States (Counter Case of the United States, p. 346). On this point the Egyptian Government has cited its law which authorized the destruction of criminal records after fixed periods of time." *Salem claim* (United States v. Egypt), Jan. 20, 1931, *Brief of the United States*, Dept. of State Arbitration Series No. 4 (2) (Washington, 1933) 9-10.

¹²⁰ *Supra*, secs. 47, 48. Speaking with reference to this general question in the *Murphy* case the United States-Chilean Mixed Claims Commission of 1892 said: "Cases may arise in which because of the date of the occurrence, the impossibility of the party to summon the other party when taking the testimony, and because of the death in the course of time of the witnesses, it may be impossible to present them for cross-examination by the respondent party. When such circumstances arise, it seems equitable not to reject this kind of evidence as entirely null and invalid." *Minutes of Proceedings* (1894) 123, 127. See also *Palmas Island* case (United States v. Netherlands), Jan. 23, 1925, *Rejoinder of the United States*, pp. 21-24.

¹²¹ "The evidence of which the Commission will be able to dispose is limited by the very nature of the claims.

"Most of the claims originate in acts of violence, of which documentary evidence will seldom if ever, be available." *Cameron* case (Gt. Britain v. Mexico), Nov. 19, 1926, *Decisions and Opinions*, p. 35. See *Solis* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1929) 48.

thus offered by putting the witness under oath. It is considered that such sworn testimony is far superior to unsworn, and that where, as is frequently the case, the choice lies between submitting the simple statement of the witness, and formalizing his statement by putting him under oath, it is considered that the latter procedure offers a much greater guarantee of truthfulness.¹²² The sanction of prosecution for perjury is a potent inducement to the witness to testify truthfully.

For these reasons many tribunals in declining to exclude affidavits as evidence have echoed the sentiment expressed in the following passage from the opinion of the British-Mexican Claims Commission in the *Cameron* case:

"If the evidence already being so scarce, the Commissioners were to be deprived of the light of truth, dim as it may be, that may shine out of some affidavits, it would mean that their task would be attended by greater difficulties than seems unavoidable, and that the position of one party to the convention would be seriously prejudiced."¹²³

Section 54. The Same: Arguments Concerning Admission and Evaluation of Affidavits. Attacks upon affidavits have related both to the propriety of their admission and to their evaluation as evidence if admitted. Attacks relating to their weight have perhaps been more numerous, as the provision in the arbitral agreement to the effect that all documents or other evidence submitted by or on behalf of governments shall be considered by the tribunal, has seemed to preclude any argument as to the propriety of admitting affidavits.

However, in the British-Mexican Claims Commission of 1926, in which the Convention provided for the submission of any "documents, interrogatories or other evidence," the Mexican Agent contended that the omission of the word "affidavit" made it impossible for the Commission to receive evidence in that form. He pointed to the inclusion of the word "affidavit" in some of the other Mexican claims agreements, and alleged that in this instance the Mexican Government had not intended to provide for their admission. The Commission unanimously refused to accept this

¹²² "The reasons why affidavits are used by Governments, such as those of the United States and Great Britain, which can probably be said to have engaged more extensively in international arbitration than have any others, is, of course, to give weight to statements laid before international tribunals. It is to put back of testimony furnished moral sanction and such legal sanction as may be found in punishment for false swearing. The purpose is to approach as nearly as possible, in these less formal proceedings, before international tribunals, the standards exacted by domestic tribunals, rather than to make use of unsworn statements and other things, without such sanction." Memorandum delivered by Mr. Nielsen in Reply to the Memorandum of April 24, 1934, Delivered by His Excellency, Sevki Bey, *Turkish Claims Settlement*, Nielsen's Report (1937) 64.

¹²³ *Decisions and Opinions*, p. 36.

contention, basing its action on the necessity for resorting to such evidence. Recognizing that affidavits "contain evidence which can be described as secondary evidence," and that they "must . . . be weighed with the greatest caution and circumspection," the Commission declared that it would be "utterly unreasonable to reject them altogether."¹²⁴ In his separate opinion, the Mexican Commissioner considered the principle of freedom in the admission of evidence "universally accepted both in Municipal and International Law" to be controlling.¹²⁵ The British Commissioner stated that little consideration should be given to the statements by the Agents as to the intentions of their Governments and held that "since, in nearly all material respects affidavits are almost identical with interrogatories," they were clearly to be admitted under the Convention.¹²⁶

In the *Salem* case, the Egyptian Government contended in its Counter-Case that, since affidavits were a form of evidence unknown to Egyptian law, they should be excluded by the tribunal.¹²⁷ The United States replied in its *Brief* that the arbitration was not governed by Egyptian law, and that arbitral tribunals in the past had "permitted the widest latitude" and had "adopted the utmost simplicity with respect to evidence," usually receiving "all documents or writings, formal or informal offered by the contending governments." It added that it might "equally as rightfully have submitted unsworn statements in lieu of affidavits," as the Egyptian Government had done, but that it "preferred to insist that such statements be sanctioned by the oaths of their authors in order to entitle them to a higher degree of credibility than the Tribunal might be willing to give to mere unsigned and unsworn statements."¹²⁸ The Tribunal accepted the affidavits submitted, but without commenting upon the point in its opinion.

With reference to the weight which may properly be attached to affidavits if admitted, perhaps the most extensive and most thorough discussion of this subject is that to be found in the exchange of briefs by the American and Chilean Agents before the United States-Chilean Mixed Claims Commission of 1897 on the *Admissibility and Effect of Affidavits and other Ex Parte Writings*. The Chilean Agent contended that "no legal weight" should be attached to "*ex parte* proofs adduced . . . without notice to or knowledge of the respondent Government, and without the latter having had the opportunity to witness the swearing and examination of the witnesses, nor to exercise the privilege accorded by modern laws to cross-examine the witnesses." He asserted that

¹²⁴ *Cameron case, Decisions and Opinions*, pp. 33, 35.

¹²⁵ *Ibid.* 48.

¹²⁶ *Ibid.* 41.

¹²⁷ *Salem Claim* (United States v. Egypt) Jan. 20, 1931, Dept. of State Arbitration Series No. 4(4) (Washington, 1932) 11.

¹²⁸ *Ibid.*, Series No. 4 (2), pp. 7-9.

the laws of Chile and the United States were in accord in holding to be without "legal and sufficient evidential value . . . testimony taken without notice to or knowledge of the other party." In Chile, he said, in order that weight might be attached to evidence, the following formalities were essential: Judicial authorization, notice to the opposite party, and the swearing of witnesses. In American courts, he declared, affidavits were received "for no other purpose than to justify the court in moving to an inquiry," but that in no case are they "received when the inquiry itself is the subject of consideration by the Court." These rules he concluded to be "justified by human experience," saying:

"Parties making affidavits are for the most part interested in the cause to which the affidavits relate, and the statements contained in the affidavits are usually biased statements, and in some cases they are altogether false. The test of the accuracy of a witness, of his good faith, of his freedom from partiality in the cause can only be ascertained by a cross-examination. Hence it follows that in courts of justice affidavits are rejected uniformly when the merits of the controversy are under investigation. The reason existing in courts of justice applies with greater force in this Commission. The claimants have not presented them for examination, nor given any reason for not presenting them."¹²⁹

In its *Brief* the United States had contended:

"(1) That this Commission must receive *as evidence* all written documents and statements which are presented by either Government and must consider them in arriving at its conclusions.

"(2) That these documents and statements are to be given such weight as they seem to be entitled to both intrinsically and in view of surrounding circumstances and other facts proven in the case; and

"(3) That the mere fact that they are *ex parte* may possibly affect their *weight* when contradicted by other proof but cannot possibly affect their *admissibility* as legal evidence."

The United States admitted that this represented a departure from the common law rules of evidence, but argued that the rules of the Convention and the nature of the Commission and its work made it necessary.¹³⁰ Diplomatic claims were based upon such evidence, and it was necessary that the evidence contained in the diplomatic correspondence of the parties be laid before the Commission. The

¹²⁹ *Brief of the Agent of Chile in Reply to the Brief of the Agent of the United States on the Question of Affidavits*, pp. 6-8, in Perry's Report (1901).

¹³⁰ "Art. V . . . They [the commissioners] shall be bound to receive and consider all written documents presented to them by or on behalf of the respective Governments. . . ." Convention of Aug. 7, 1892, revised by that of May 24, 1897, 1 Malloy's *Treaties* 187, 190.

precedents of previous Commissions to which the United States had been a party were cited at length to show that affidavits had been admitted and given legal weight. The opinion in the *Murphy* case before the United States-Chilean Mixed Claims Commission of 1892 was quoted to the effect that the Commission was "at liberty to take affidavits into consideration and to attribute to them a limited value or no value whatever according to circumstances." The Commission, it was asserted, examined the affidavits objected to and found certain facts established by them. The infirmities arising from their *ex parte* character having been removed by the Convention so far as their admission was concerned, it was concluded that "they must be weighed and treated precisely as all other evidence is."¹³¹

The Commission announced no formal decision upon the subject, but the American Agent stated in his Report that it appeared to have accorded less weight to affidavits than to so-called official letters.¹³²

The value of affidavits as evidence has probably been challenged more frequently by Mexico than by any other Government.¹³³ Commissioner Roa declared broadly in his separate opinion in the Russell case before the United States-Mexican Special Claims Commission of 1923:

"The undersigned believes that he states a truth universal in character when he says that evidence taken without notice to the opposite party is valueless in contested actions (see 'Prueba Testifical y Perical' (Testimonial and Expert Evidence) by Lessona, pp. 5 and 11).¹³⁴

The Commissioner discussed affidavits at length in this opinion and in his Supplementary Observations, the gist of his objection to such evidence being that it is rendered unreliable and unfair by the absence of cross-examination. He concluded that to found an award on affidavits "means to take the risk of committing many injustices."¹³⁵

Commissioner Nielsen in commenting in his opinion upon the contention of the Mexican Agent that "affidavits do not have any evidentiary weight," pointed out that all the evidence produced before the Commission "either by Mexico or by the United States"

¹³¹ *Brief on Behalf of the United States as to the Admissibility and Effect of Affidavits and other Ex Parte Writings*, pp. 1-14, in Perry's Report (1901). A summary of these briefs is printed in Ralston's Report (1904) 600-602.

¹³² Perry's Report (1901) 13.

¹³³ For position of Mexico taken in the United States-Mexican Mixed Claims Commission of 1868, see *supra*, sec. 52.

¹³⁴ *Opinions of Commissioners, 1926-1931*, pp. 97, 105. It may be stated that the citation from Lessona, which is apparently to volume IV of his treatise, contains no discussion of international judicial procedure. It is concerned with the definition of testimonial proof in Italian law.

¹³⁵ *Ibid.* 110.

had been *ex parte*. "Neither Government," he said, "has had representatives present for purposes of cross-examination when evidence has been prepared for the trial of cases before the Commission."¹³⁶ Referring to the provision in Article IV of the Convention of September 10, 1923, that "the agents or counsel of either Government may offer to the Commission any documents, affidavits, interrogatories or other evidence," Commissioner Nielsen further observed:

"It is certainly a rule in construing treaties, as well as all laws, to give a sensible meaning to all their provisions if that be practicable. Treaty stipulations will not be regarded as a nullity unless the language clearly makes them so. It will not be presumed that the framers of a treaty have done a vain thing. See Moore, *International Law Digest*, vol. V, p. 249, and the numerous citations there given. If it is a sound contention that affidavits 'do not have any evidentiary weight,' then the very distinguished gentlemen who originally framed the Convention of September 10, 1923, the very distinguished plenipotentiaries who signed in behalf of the two Governments, the President of each country who ratified it, and the legislative body in each country that gave it approval, all combined to require an absolutely useless thing, when they respectively joined in the formulation of the stipulations requiring the Commission to make use of affidavits. If such affidavits 'do not have any evidentiary weight,' they could only be of some personal, entirely extra-official, use to the Commissioners. Every interpretation that leads to an absurdity should be rejected. *Geofrey v. Riggs*, 133 U.S. 258, 270; *Lau Ow Bew v. United States*, 144 U.S. 47, 59; Vattel, *Law of Nations*, Chitty's edition, p. 251; Grotius, *De Jure Belli Et Pacis*, Whewell's edition, vol. II, p. 161; Pradier-Fodéré, *Traité de Droit International Public*, vol. II, Sec. 1180, p. 885."¹³⁷

This Commission appears to have accepted affidavits as sufficient proof of nationality of some of the claimants in the *Santa Isabel* case, as it proceeded to dispose of the case on its merits over an objection by Mexico to the jurisdiction on the ground that nationality had not been adequately established.¹³⁸

The same contention, that an affidavit was "wanting in any probatory force, inasmuch as it is *ex parte*," was made by Mexico before the United States-Mexican General Claims Commission and rejected in the *Solis* case. In the course of an elaborate opinion on the question, the Commission declared that "when sworn testimony is submitted by either party the other party is of course privileged to impeach it, and further to analyze its value, as the

¹³⁶ *Ibid.* 49.

¹³⁷ *Ibid.* 50-51.

¹³⁸ *Ibid.* 51, 53.

Commission must do.”¹³⁹ Before the British-Mexican Commission, the Mexican Agent contended both that affidavits should be rejected entirely, and that if admitted they should be assigned no probatory force. As previously stated, the Commission refused to heed the first contention, and it likewise declined to recognize the validity of the second, although stating that affidavits “must . . . be weighed with the greatest caution and circumspection.”¹⁴⁰ The British Commissioner declared that the absence of cross-examination in the case of testimony presented in affidavits did not affect its right to admission but merely went “to the weight which the statements ought to carry with the tribunal or their probative value.”¹⁴¹

Section 55. The Same: Practice of Tribunals With Respect to Admission of Affidavits. No question as to the admission of affidavits can arise in those instances in which the arbitral agreement or the rules of procedure specifically provide that they may be offered by the parties, or that they may be received by the tribunal. This has been done in some recent arbitrations.¹⁴² It would seem that there could likewise be no doubt concerning the admission of affidavits when the arbitral agreement provides, as it frequently does, that all documents, statements or other evidence submitted by or on behalf of the parties shall be considered by the tribunal, but affidavits have been challenged, although unsuccessfully, in the face of such a provision.¹⁴³

¹³⁹ *Opinions* (1929) 48, 49.

¹⁴⁰ *Cameron case, Decisions and Opinions*, p. 35.

¹⁴¹ *Ibid.* 42.

“The Egyptian Government objects that it has not had the opportunity to apply to the affidavits of George J. Salem and George Nassif, the test of cross-examination. All the essential facts of which these men have given evidence in their Affidavits developed and took place in Egypt. After the first of these affidavits was filed with the Egyptian Government and before its Reply in this case was filed with the United States, five months elapsed during most of which time the Egyptian Government had unrestricted and complete opportunity, within its own territory, to develop evidence in refutation of those affidavits. One of the affiants, Nassif, remained amenable to the jurisdiction of Egyptian authorities and courts during that whole period of time.” *Salem case* (United States v. Egypt), Jan. 20, 1931, *Brief of the United States*, Dept. of State Arbitration Series No. 4(2) (Washington, 1933) 10-11.

¹⁴² United States-Mexican General Claims Commission, Sept. 8, 1923, Art. III, 3 *Treaties, Conventions*, etc. (Redmond, 1923) 4441, 4442; United States-Mexican Special Claims Commission, Sept. 10, 1923, Art. IV, *ibid.* 4445, 4446-4447; United States-German Mixed Claims Commission of 1922, Order of Nov. 15, 1922, Morris' Report (1923) 14; American-Panamanian General Claims Commission of 1926, Rules of Procedure, Art. 23, Hunt's Report (1934) 848. See also *supra*, pp. 177-178.

¹⁴³ See cases cited *supra* in section 52. In the *Halifax Commission*, the Commission overruled the contention of Great Britain that the admission of affidavits would be contrary to the provision in Article XXIV of the Convention of May 8, 1871, to the effect that the Commissioners were “bound to receive such oral or written testimony as either Government may present.” *Proceedings* (1878), vol. I, p. 13.

Tribunals have uniformly declined to accept the validity of arguments against the admission of affidavits.¹⁴⁴ It seems doubtful whether a tribunal would today refuse to receive affidavits for appropriate consideration unless bound to do so by a provision in the arbitral agreement.¹⁴⁵ In the one instance in which the Permanent Court of International Justice has been called upon to consider the question, it has admitted affidavits.¹⁴⁶ Most of the cases submitted to it have been of a character not to lend themselves to such proof, and, furthermore, most of the parties before it have been those in whose procedure no provision is made for the use of affidavits.

Varying reasons have been assigned, however, for the acceptance of affidavits in proof of contested facts, and, of course, there can be no uniformity in the matter of the weight attached to them when admitted. In some cases, it has been held that evidence in the form of affidavits constitutes a sufficient basis for an award in the absence of rebutting evidence. An award may be based on the unsupported affidavit of the claimant himself, or upon affidavits by other parties in interest, if the testimony contained in it appears credible, and the respondent fails to produce any evidence to contradict it. In the *Gage* case before the United States-Venezuelan Mixed Claims Commission of 1903, Umpire Barge declared that he could not "set aside" the sworn statement of the claimant and his former co-claimant when "not contradicted or debilitated by any other evidence or by any intrinsic defect."¹⁴⁷

¹⁴⁴ In addition to cases previously cited, see British Guiana-Venezuela Boundary Arbitration, Feb. 2, 1897, *Proceedings* (1899), vol. IV, pp. 886, 887; *Evertz* case (Netherlands v. Venezuela), Feb. 28, 1903, Ralston's Report (1904) 904; *Metzger* case (Germany v. Venezuela), Feb. 13, 1903, *ibid.* 578; "*The Horace B. Parker*" case (United States v. Gt. Britain), Aug. 18, 1910, Nielsen's Report (1926) 570-572; "*The Zafiro*" case, *ibid.* 578-579. See also *Lusitania Claims*, Canada Report of the Royal Commission on Illegal Warfare Claims Reparations (Ottawa, 1928), vol. 1, p. 143.

In admitting the affidavit of the claimant as sufficient proof of ownership of certain bonds, adequate guarantee of the credibility of the affiant having been given, the German-Belgian Mixed Arbitral Tribunal said in the case of *O. V. C. (Banque Nationale de Belgique) v. R. A. A. (Reichsschulden-Verwaltung et Preuss Staatsschulden V)*: "Même en l'absence de tels moyens de preuve [des extraits de livres, des bilans etc.], l'affidavit peut acquérir une valeur probante tout particulière du fait de l'honorabilité reconnue du créancier ou du fait des raisons indiquées par lui pour expliquer que la production de pièces comptables ou d'autres justifications soit impossible." 6 *Recueil des décisions* 704, 706 (1926).

¹⁴⁵ Witenberg comments that in the cases in which the matter has been contested the admissibility of affidavits has been definitely admitted and adds: "Thus admissibility can actually be considered as being customary in international arbitral law." *L'organisation judiciaire*, *op. cit.* 255, translation.

¹⁴⁶ *Readaptation of the Mavrommatis Jerusalem Concessions* case, Series C, No. 13-III, pp. 488, 489.

¹⁴⁷ Ralston's Report (1904) 166. In the *Faulkner* case (United States v. Mexico), Sept. 8, 1923, the Commission accepted the affidavit of the claimant as sufficient proof of "intolerably bad" jail conditions, saying that nothing had been "adduced to militate against" the testimony contained in the affi-

Affidavits characterized as "meager" have been accepted as sufficient when nothing was adduced to throw any doubt upon the essential facts asserted in them.¹⁴⁸

The United States-Chilean Mixed Claims Commission of 1892 appears to be the only tribunal that has taken the position that affidavits have corroborative value only and are insufficient standing alone to support an award. In a lengthy opinion in the *Murphy* case, the Commission held that affidavits should be admitted, but added:

" . . . we must . . . take them into consideration not as evidence, but only as elements which in certain cases may contribute to a limited extent, collateral or secondary, to confirm or strengthen a conviction appearing to be based on proofs of a more conclusive character."

The Commission proceeded to hold that the claim should be disallowed since all the documents furnished in support of the claim were affidavits executed ten years after the event, and since the claimant had not taken advantage of the opportunity "to give legal force to the evidence presented."¹⁴⁹ Commissioner Goode, American, dissented, declaring that it could not have been the purpose of the Convention in requiring that the Commission "receive and consider all written documents or statements," that affidavits should be admitted but deprived of "evidential value." He added that as the testimony contained in the affidavits was "entirely uncontradicted . . . its legal effect must be considered to establish the claim."¹⁵⁰ With Commissioner Goode dissenting, the Commission held, in the *Thorndike* case, that the documents presented by the claimant, consisting largely of affidavits, lacked "sufficient legal weight to warrant a decision against the respondent." It added, as additional reasons for disallowing the claim, that the claimant had not "made any efforts to produce his testimony in accordance with the rules of procedure established by the Commission," and that he had failed to produce available public records.¹⁵¹ Those decisions go far in denying evidentiary weight to affidavits as such on the ground that the testimony contained in them was taken without notice and without cross-examination,

davit. *Opinions* (1927) 86, 88. See also separate opinion of Commissioner Nielsen, *ibid.* 92, 95. In accord with this, see *Kidd* case (Gt. Britain v. Mexico), Nov. 19, 1926, *Decisions and Opinions*, pp. 50, 51.

¹⁴⁸ *Hatton* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1929) 6, 7; *Richter* case (Germany v. Venezuela), Feb. 13, 1903, *Ralston's Report* (1904) 575, 577. See also *Read* case (United States v. Chile), Aug. 7, 1892, *Shield's Report* (1894) 78, 79.

¹⁴⁹ *Minutes of Proceedings* (1894) 123, 127, 134. For text of the opinion in this case and in the *Thorndike* case, see also III Moore's *Arbitrations* 2262-2276.

¹⁵⁰ *Minutes of Proceedings* (1894) 135, 138.

¹⁵¹ *Ibid.* 171, 173-174.

although strictly speaking, they can be said to be limited to a disallowance of the claims on the ground of the insufficiency of the evidence.¹⁵²

The United States-German Mixed Claims Commission of 1922 disallowed one or two claims on the ground that the only evidence in support of the claim consisted of affidavits which were uncorroborated. In one case, however, the testimony contained in two separate affidavits was contradictory, and in the other it was denied by a number of witnesses, so that the disallowance did not rest, in either case, on the ground of lack of corroboration alone.¹⁵³

Section 56. The Same: Probative Value of Affidavits Determined by Tribunal.¹⁵⁴ After their admission, it is well settled that the question of the evidentiary weight to be attached to affidavits is a matter entirely within the discretion of the tribunal.¹⁵⁵ The tribunal may accord to them "much, little or no weight" according to its evaluation of the testimony contained in them under the particular circumstances of the case.¹⁵⁶ In determining the probative value of affidavits, the tribunal will, of course, take into account such factors as the credibility, sources of information,

¹⁵² The Agent of the United States said in his Report with reference to the *Thorndike* case: "In view of the decision in the *Murphy* case, which held that affidavits coming from the State Department under the treaty and rules were admissible, the judgment in this case must have been on the ground that the evidence was insufficient to establish the claim." *Shield's Report* (1894) 51, 54.

¹⁵³ *Hier* case, *Administrative Decisions and Opinions*, etc. (1926) 648; *Gillenwater* case, *ibid.* 798-801.

¹⁵⁴ Cf. *supra*, sec. 4.

¹⁵⁵ *Lozano* case (Spain v. Netherlands), April 2, 1903, *Ralston's Report* (1904) 930-931; *Evertz* case (Netherlands v. Venezuela), Feb. 28, 1903, *ibid.* 904-905; *Solis* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1929) 48-50; *Russell* case (United States v. Mexico), Sept. 10, 1923, *Opinion of Commissioner Nielsen, Opinions of the Commissioners, 1926-1931*, pp. 44, 50-51. See also *Pelletier* case (United States v. Haiti), May 24, 1884, *Record of Pelletier Claim* (1885), vol. I, pp. 781, 807-809; *Solomon* case (United States v. Panama), July 28, 1926, *Reply Brief of Panama*, *Hunt's Report* (1934) 470; *Noyes* case, *ibid.*, *Memorandum of Panama*, *Hunt's Report* (1934) 185; *Garry* case (United States v. Gt. Britain), May 8, 1871, *Argument for the United States, Pleadings and Awards* (1910), vol. V, Claim No. 60. For general discussion of power of tribunals in the evaluation of evidence see *supra*, sec. 4.

"L'affidavit est donc admissible, sauf à la Commission à user de prudence et de circonspection quant au mérite probatoire à lui accorder." Witenberg, *La théorie des preuves devant les juridictions internationales*, Académie de droit international, *Recueil des Cours*, 1936, II, vol. 56, pp. 82-83.

¹⁵⁶ See, for example, the following statement from the record of the proceedings of the United States-Chilean Mixed Claims Commission of 1897: "The Agent for the United States stated that he had conferred with the Agent for Chile upon the subject of *ex parte* evidence, and both being about to file briefs on this question neither asked the Commission to decide that they would or would not be influenced by it in all the cases, but both of them desired the Commission to weigh each item of such evidence when offered, and give much, little or no weight to it as it might seem to deserve, all of which would be more fully set forth in the briefs." *Minutes of the Commission* (1901) 63.

pecuniary interest and family ties of the affiants.¹⁵⁷ It will also take into account the fact that the witness has not been subjected to cross-examination, and that the opposing party may not have had an adequate opportunity for answering the allegations contained in the affidavits.¹⁵⁸

A tribunal may, if the circumstances seem to warrant, deny any probative value to affidavits, but as previously indicated it is generally held that this may not properly be done simply on the ground that affidavits as such carry no evidentiary weight.¹⁵⁹ Affidavits containing hearsay evidence are naturally subjected to special scrutiny, while those "stating acts of the affiants or acts that affiant knew directly" have been said to constitute "full proof."¹⁶⁰ However, even affidavits based upon such direct information would not necessarily be conclusive evidence of the facts asserted in them.

Affidavits of unconvincing weight may not be considered as constituting sufficient basis for an award in the absence of other

¹⁵⁷ *Parker* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1927) 35, 37; *Palmas Island* case (United States v. Netherlands) Jan. 23, 1925, *Explanations of the Netherlands Government* (The Hague, 1927) 14.

¹⁵⁸ *Tacna-Arica Arbitration* (Peru v. Chile), July 20, 1922, *Opinion and Award of the Arbitrator* (Washington, 1925) 33. For text of award, see also 122 Br. and For. St. Paps. 219-262. See also *Wilkinson* case (United States v. Gt. Britain), May 8, 1871, "Argument for the United States," p. 3, *Pleadings and Awards* (1910), vol. 2, Claim No. 28.

In his Supplementary Observations in the *Russell* case (United States v. Mexico), Sept. 10, 1923, Commissioner Roa quotes the following extract from a memorandum concerning evidence submitted by the President of the Commission to the national Commissioners, based upon the answers to certain questions propounded by him to the latter, during the proceedings in the *Santa Isabel* cases:

"Testimonial evidence being that which due to the frailty of human contingencies is most liable to arouse distrust, it must not be divested of all those conditions which the wisdom of all time has created in order that full credence may be given to it. It was certainly for this reason that the Commission in their Rules of Procedure provided for and regulated the hearing of witnesses before them (Rule IX), that does not imply that it is essential that testimony be given before the Commission. But what is indispensable in order that such testimony may constitute full proof, is that it be rendered with all those formalities with which law and usage have everywhere required that it be clothed in order that it may be accepted as full proof." *Opinions of the Commissioners, 1926-1931*, pp. 173, 184.

¹⁵⁹ See *supra*, pp. 175-179.

"This provision [Article VIII of the Convention of Aug. 7, 1892], taken with rule 15 [Rules of Procedure], leaves the Commission at liberty to take affidavits into consideration and to attribute to them a limited value or no value whatever, according to circumstances. Thus it may give them a certain relative importance or deny them all value, especially when the parties have had opportunity to furnish better evidence and have neglected to do so, or when they have had opportunity to conform to the rules established by this Commission for the validity of the proofs, and they have failed to observe them." *Murphy* case (United States v. Chile), *Minutes of the Proceedings* (1894) 122, 127-128. For text of Rule 15 of the Rules of Procedure, see III Moore's *Arbitrations* 2234, and for text of Art. VIII of the Convention, see 1 Malloy's *Treaties* 187. See also *supra*, sec. 52.

¹⁶⁰ *McCardy* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1929) 137, 141.

supporting evidence. In the *Tacna-Arica Arbitration*, President Coolidge, sole arbitrator, declared in his award, with the reference to a charge that Chile had expelled Peruvians from the disputed area in 340 cases, that *ex parte* affidavits, few of which made out a sufficient *prima facie* case, were "too unsubstantial a foundation upon which to establish such a charge."¹⁶¹ The United States-Mexican General Claims Commission of 1923 refused to accept affidavits alone as sufficient evidence to substantiate allegations of grave misconduct on the part of Mexican officials consisting of the alleged luring of the claimant into Mexico, arresting and imprisoning him without cause, and mistreating him, and unduly delaying the procedure of his trial.¹⁶²

Section 57. The Same: Conclusions. Experience has demonstrated the practical necessity for permitting parties to international judicial proceedings to resort to the use of affidavits as a means of proof. In too many cases, parties would be left without any means of proof if the use of affidavits were outlawed. Evidence embodied in affidavits, accumulated during the course of diplomatic correspondence would either be rendered unavailable, or the evidence would have to be taken again by deposition which would not infrequently be impossible because of the death, removal, or unknown location of the witnesses. The remote origins of some cases, the complex questions of fact involved, and the far flung area covered by the cases submitted to some tribunals sometimes render primary documentary and testimonial evidence completely unavailable, or, if it is in existence, make its procurement excessive in cost. These conditions would make it difficult or impossible for representatives of the parties to be present at the taking of depositions. Although advocates and counsel have disagreed sharply on the matter, motivated naturally by the exigencies of their particular cases, tribunals, speaking both collectively and severally, have been virtually unanimous in considering that the ends of equity and justice are better served by the admission of affidavits. It has seemed preferable to them to assume the heavy

¹⁶¹ *Tacna-Arica Arbitration* (Peru v. Chile), July 20, 1922, *Opinion and Award of the Arbitrator* (Washington, 1925) 30.

¹⁶² *McCardy case*, *supra*, note 160, at pp. 140, 141.

"The evidence consists of the affidavits of certain persons who state that they witnessed it, and of others who testify that Weil, at the time alluded to in the claim, carried toward the Mexican frontier from Texas a train of carts loaded with cotton; or who state that they afterwards heard of the occurrence of the robbery on which the claim is founded. . . .

" . . . with regard to a claim of this kind my judgment refuses to consider it as proven upon two or three affidavits." *Weil case* (United States v. Mexico), July 4, 1868, *Opinion of Commissioner Zamacoma*, H. Ex. Doc. 103, 48th Cong., 1st sess. 23. See also *Durio case* (Spanish Treaty Claims Commission Act of March 2, 1901), *Opinion No. 40*, p. 7; *Black case* (United States v. Gt. Britain), May 8, 1871, "Argument for the United States," pp. 2-3, *Pleadings and Awards* (1910), vol. IX, Claim No. 128.

burden of sifting the unreliable testimony out of the affidavits presented, rather than to shut out the light afforded by the facts which they may contain. Parties have, with some exceptions, been willing to assume the risk involved in the use of such evidence.

However, as pointed out above, there is not a unanimity of opinion in favor of the superiority of depositions as compared with affidavits. That superiority is supposed to rest on the better assurance of truthful testimony resulting from the formal interrogation of the witness by a judge in the presence of the representatives of the parties. In theory, the formal ceremonies surrounding the taking of depositions should constitute a more effective means of inducing truthfulness and accuracy on the part of the witness, than the informalities frequently associated with the preparation of affidavits, at least in the United States. Whether this is actually true in fact would seem to depend upon the effectiveness with which the interrogation is conducted by the judge. If conducted as a routine formality on the basis of written interrogatories, the procedure can hardly have more than a doubtful claim to superiority. A lawyer trained in the common law finds it quite difficult to perceive any intrinsic superiority in a procedure consisting largely in putting leading questions to a witness who is required only to answer yes or no. He is inclined to regard as at least equally meritorious the direct statements of facts set down in affidavits under the solemnity of an oath. If the affidavit consists of the unvarnished and straightforward statements of the affiant, set down under circumstances of due solemnity in the administration of the oath, there would seem to be some justification for this view.

Unfortunately, these features are not typical in the preparation of affidavits in the United States. Because of the informality and looseness of their drafting, and the laxness characterizing the administration of oaths at a nominal fee by the ever ready notary public or justice of the peace, affidavits have been subject to widespread abuse, not only in matters relating to arbitration, but in their general use for the various purposes permitted or required by law, both in judicial and non-judicial proceedings. The remoteness of the tribunal, however, and the indefiniteness of penalties for perjury tend to render abuse much more serious in international judicial proceedings. No better illustration of the possibilities of the prostitution of the affidavit as an instrument of proof in such proceedings can be found than in the experience of the Commissioner designated under the act of March 21, 1935, to distribute the Turkish Indemnity to be paid under the agreement of October 25, 1934.¹⁶³

¹⁶³ No formal proceedings were had before the Commissioner, the cases being determined upon the basis of evidence which had been furnished by the claimants before the presentation of the claims to Turkey or later at the request of the Commissioner, supplemented by records relating to the claims

In his report, the Commissioner stated that two principal difficulties were encountered in passing on the cases. That is, that law had to "be applied to facts without any assistance from contentions by either Government, and that cases had to be dealt with on the basis of *ex parte* presentations." These *ex parte* presentations involved a "profuse use of . . . affidavits" by the claimants. With respect to these affidavits the Commissioner declared:

"Use was made of forms. These forms were in identic language and contained blanks, and the names of witnesses were inserted in the blanks. Large quantities of carbon copies had evidently been prepared for the insertion of names in that manner. Witnesses whose qualifications for testifying vary greatly swore to the same things appearing in these forms, such as values of property and complaints of wrongful acts said to have been committed by Turkish authorities and by other persons in the service of the Turkish Government."¹⁶⁴

Especially flagrant abuse was described in the case of *Yohan-nian et al.*, disposing collectively of some ninety claims "predicated on loss of property and on personal injuries and loss of life, all said to have been inflicted in Persia during the period between 1914 and 1919." All of the cases dealt with in the opinion, it was declared, contained "either printed affidavits or affidavits in which affiants testify in practically identical language with regard to ownership and value of property and with regard to the conduct of Turkish troops in Persia." Form affidavits had been prepared in wholesale quantities containing "blank spaces for the insertions of names of affiants and in some cases for insertions relating to occupation, address, age, place of birth, and education of affiants." Affiants testified of "personal knowledge" to facts and occurrences which it was clearly demonstrated they could not have personally witnessed. In many instances the first and third pages of affidavits were found to be identical with the exception of insertions made in blank spaces, "obviously prepared for prolific use in affidavits in numerous claims."¹⁶⁵

from the files of the Department of State. Nevertheless, the procedure followed was "in the nature of a judicial disposition" of the cases, and formal opinions were rendered with reference to every claim, containing a statement of the law and the facts upon which the conclusion reached was based. *Turkish Claims Settlement*, Nielsen's Report (1937) 3, 8. For Act of March 21, 1935, see 49 Stat. 76.

¹⁶⁴ *Turkish Claims Settlement*, Nielsen's Report (1937) 9.

¹⁶⁵ *Ibid.* 404, 406-409. For other instances of the abuse of affidavits in these proceedings, see *Jesse M. Yonan and Isaac H. Yonan case*, *ibid.* 550-560; *Arsanis case*, *ibid.* 216, 221; *Avak case*, *ibid.* 651, 656 (in which it was ascertained by the Federal Bureau of Investigation, at the request of the Commissioner, that the make of paper on which an affidavit had been prepared, bearing the date April 28, 1919, was first manufactured on March 17, 1923); *Pirocaco case*, *ibid.* 587-595. For cases in which arbitral awards have been disallowed because based on fraudulent evidence, including affidavits, see *infra*, secs. 103-105.

Serious as this situation is, and unfortunately, while it is extreme, it is not exceptional, the remedy hardly seems to consist in the elimination of affidavits as evidence. The *Turkish Claims Settlement* itself offers an illustration of the truth of this, for aside from the flagrant abuses of its use, there was a basic necessity for an extensive use of affidavits in these cases, if the Commissioner was to have any light at all on the questions presented. A number of remedies suggest themselves. Tribunals should be more insistent upon the production of "primary" evidence when it is available. This does not necessarily mean that affidavits should be excluded. They may, as in the past, continue to be admitted, specific discretion being given to the tribunal to refuse to base an award on affidavits alone, if in its opinion better evidence could have been presented.

In the second place certain changes should be made in the preparation of affidavits, designed to instill in affiants a greater respect for the truth. The principal change in this respect might be to make a more solemn ceremony of the taking of the oath. Governments would be warranted in requiring that all affidavits executed after the conclusion of the arbitral agreement for use in the proceedings be executed only before judicial officials of either of the parties. Affidavits executed before diplomatic and consular officers might be excepted, as the requisite formality could be obtained before them. But so long as affidavits executed before the thousands of notaries public and justices of the peace scattered over the country, whose offices endow them with no especial authority in the eyes of the average citizen, remain acceptable in international proceedings, there is little hope of improving the quality of affidavits. In civil law countries, such as France, notaries enjoy a quite different reputation, and, in fact, occupy a position equivalent to that of the lower ranks of judges in this country. There could be no objection to the execution of affidavits before such officials. It may be, as suggested by the British Commissioner in the *Cameron* case before the British-Mexican Commission, that the officers before whom affidavits are ordinarily executed in England command higher prestige than do notaries and justices of the peace in this country. However that may be, the rules with respect to execution of affidavits should be uniform in the territory of all parties. Perhaps the most practicable way of accomplishing this would be to provide in the arbitral agreement the method by which affidavits should be prepared and to specify the officers before whom they should be executed. A further change that would be beneficial would be a requirement that affidavits be drafted in the language of the affiant, modified only as to matters of form. Formalized affidavits which reproduce primarily the views of an attorney rather than the fresh statements of the affiant need to be strongly discouraged.

Thirdly, it is imperative that laws be enacted and stringently enforced providing punishment for perjury committed in affidavits prepared for use in international proceedings. A step in this direction has been taken by the enactment of the American law of July 3, 1930, as amended on June 7, 1933, conferring the authority upon the members of tribunals to which the United States is a party to compel the attendance and testimony of witnesses, and providing penalties for violation of the commissioner's writs.¹⁶⁶ The reciprocal enactment of such laws by all parties to an arbitral agreement is essential to an effective enforcement both of the appearance of witnesses and of the punishment of those who testify falsely either directly or in affidavits. Further than this, tribunals should be required by the arbitral agreement to report formally to each party all instances of false testimony in affidavits, or in any other evidence presented before them, and a direct obligation undertaken by the parties to impose prompt and appropriate punishment upon all guilty persons found within their jurisdiction. Such procedure would do much toward the elimination of abuses in the preparation of affidavits.

In the fourth place, it is fair to say that without any change in the existing procedure of taking affidavits, a great improvement could be accomplished by a change in the attitude of both governments and agents toward the prosecution of cases. If they were less anxious to win cases and more eager to prepare and present cases on the basis of their merits, there would be much less temptation to use doubtful affidavits. Adherence to a standard of action such as that stated by the United States-Mexican General Claims Commission of 1923 in the *Parker* case, (that is that each Agent is under an obligation "to lay before it [the Commission] all of the facts that can reasonably be ascertained by him concerning each case no matter what the effects may be") would go far toward alleviating existing evils.¹⁶⁷ Agents need to exercise careful discrimination in the selection of cases for presentation to tribunals, eliminating those which cannot be established by *bona fide* and substantial evidence.¹⁶⁸ The position of trust which they occupy in relation to the tribunal as well as to their governments puts upon them the burden of examining with care the evidence they present to determine its *bona fide* character. Failure to fulfill this trust has been one of the most fruitful sources of abuse in the use of affidavits.

Finally, more frequent resort to the use of letters rogatory or similar rogatory commissions would obviate the use of affidavits

¹⁶⁶ For a discussion of these acts, see *infra*, sec. 69.

¹⁶⁷ *Opinions* (1927) 39-40. See *supra*, p. 84.

¹⁶⁸ See, for example, Hunt's Report (1934) 9-12, for a description of the procedure followed by the American Agent in the United States-Panamanian General Claims Arbitration in the selection of cases for presentation to the tribunal.

in many cases. The practice of the Mixed Arbitral Tribunals might well be used as a pattern in this respect.¹⁶⁹ Testimony taken by such a method is not subject to many of the criticisms justly leveled at affidavits.

In the absence of improvements along the lines suggested depositions would seem to offer a more reliable procedure for obtaining truthful evidence than affidavits. While their intrinsic superiority over affidavits is debatable, it can hardly be questioned that, as between the procedures at present obtaining, that utilized in the taking of depositions offers a more effective check on the accuracy of the testimony obtained. If it is not possible to obtain agreement on the remedies suggested, it would seem desirable for arbitral agreements, at least in the case of claims commissions, to provide that the testimony of all witnesses not appearing before the tribunal be taken on deposition, provided that exceptions be permitted by the tribunal, in its discretion, in instances in which undue hardship might result. Exception would also need to be made with respect to affidavits executed before the conclusion of the arbitral agreement if the affiants are no longer available for interrogation on deposition.

States in whose judicial procedure affidavits are not formally used should not be expected to continue indefinitely to consent to the use of affidavits as evidence unless proper steps be taken to improve international judicial procedure in a manner to compel witnesses to swear only to the truth. Nothing short of that can prove permanently satisfactory with respect to so important an instrument of proof, and yet one which permits no means of testing by direct examination the credibility of the witnesses or the validity or relevance of his statements. A procedure is surely not sound which imposes upon the tribunal the burden of separating the bad from the good in such evidence, without providing adequate safeguards to assure its integrity.

AUTHENTICATION AND TRANSLATIONS

Section 58. General Principles of Authentication. The necessity of authentication may arise with respect either to original documents or to copies, which in turn may consist either of public documents or private documents. Although the circumstances under which copies may be accepted in evidence in the latter case are not identic, especially in municipal law, and the requisite procedure for proper authentication varies somewhat, the purpose of the authentication is the same in every case. That is, it is intended to

¹⁶⁹ See, for example, Art. 53 of the rules of the Franco-German Tribunal, 1 *Recueil des décisions* 51. See *Grigoriou v. État bulgare* (Greek-Bulgarian Tribunal) 3 *Recueil des décisions* 977, 980 (1924).

afford adequate assurance that a document submitted as an original is the document which it purports to be, and if submitted as a copy, that it is an accurate reproduction of the original which it purports to represent.

Consequently, the problem of authentication is fundamentally the same in whatever system of procedure it may arise, however much the circumstances may vary under which authentication is permissible or requisite with reference to documents offered in evidence. The essential principle underlying the authentication of documents at the common law is equally applicable, therefore, in international judicial proceedings. It is that "a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; there must be some evidence of the genuineness (or execution) of it."¹⁷⁰

The declaration of Benning, J., in the case of *Stamper v. Griffin*, with reference to the authentication of documents in the state of Georgia, that "a writing, of itself, is evidence of nothing," might with equal propriety be asserted of authentication in international procedure.¹⁷¹

In the case of public documents the officer's authority to certify to the genuineness of an original document, or to the authenticity of a purported copy "rests on his custody of the original."¹⁷² What is required in the way of authentication in this instance is appropriate assurance concerning the capacity of the certifying officer, which may be presumed in some cases from the nature of the office, and concerning the genuineness of his signature. With respect to a private document on the other hand, the requisite authentication is an appropriate certification by a responsible official having personal knowledge thereof that the document was actually executed by the person whose signature it purports to bear.¹⁷³ As stated by Chief Justice Bronson in the case of *Wilson v. Betts*, although "in the ordinary affairs of men, it is very often assumed, without proof, that he whose name has been affixed to a written instrument placed it there himself . . . when the signing becomes a matter of legal controversy it must be established by proof."¹⁷⁴

¹⁷⁰ IV Wigmore's *Evidence* 545. Likewise in civil law procedure the genuineness of documents must be attested according to certain duly prescribed forms, especially private documents [*actes sous seing privé*]. See, for example, Arts. 427, 435, 440 and 441 of the 1933 German Code of Civil Procedure.

¹⁷¹ 20 Ga. 312, 320 (1856), 65 Am. Dec. 628, 630, quoted in IV Wigmore's *Evidence* 546.

¹⁷² III Wigmore's *Evidence* 554.

¹⁷³ See *Carlos Butterfield and Co.* case (United States v. Mexico), July 4, 1868, VI ms. *Opinions* 508.

¹⁷⁴ 4 Den. 201, 213 (New York, 1847), quoted in IV Wigmore's *Evidence* 546. See discussion of allegedly false signatures of natives on British treaties with natives in *Lourenço Marques Bay* case (Gt. Britain v. Portugal), Sept. 25, 1872, *Memoria apresentada pelo governo portuguez* (Lisbon, 1873) 90-93; *Segunda memoria* (Lisbon, 1874) 37.

In general, there are three essential steps in the authentication, either of public or private documents, for production before an international tribunal. In the case of public or official documents, the officer charged with their custody must certify to the authentic character of the original, or the copy, as the case may be. His signature and seal, if any, must be certified, in turn, by a responsible government official who by reason of his office is in a position to identify them. Finally, the signature and seal of this officer must be certified by an official who is in a position to determine their genuineness, and whose certification, by reason of his office, is acceptable to the tribunal. The procedure is identical in the case of private documents, except that the original certification concerns the execution of the document, and must be by an official who speaks with personal knowledge of the execution.

Aside from certain documents appearing in official publications, it is an essential prerequisite to the acceptance of any document in a proceeding before an international tribunal that its genuineness or correctness be vouched for by a public official of one of the parties having a recognized authority to make an appropriate certification. Ralston, therefore, states a broader rule than seems warranted by principle and precedent when he says that "documentary facts set out by the government are not ordinarily verified, their presentation from official sources, backed as they are by the dignity of the government, being usually regarded as ample proof of authenticity."¹⁷⁵ It is true that in some cases the simple signature of the agent of the party will be accepted as a sufficient guarantee of the authenticity of the documents presented, but in general it is expected that documents taken or copied from public records will be properly verified by the officer to whose custody they are entrusted.¹⁷⁶ Such documents may be accepted without authentication, however, if their veracity is not challenged by the opposing party. The President of the Brazilian-Bolivian Mixed Arbitral Tribunal concurred in the view of the Brazilian arbitrator that since certain documents "emanated directly from public authorities, they were valid independently of any other formalities, since they had not been impugned as to their veracity by the Government of Bolivia."¹⁷⁷ Speaking with reference to certain documents executed before a United States consul, the Umpire of the United States-Peruvian Mixed Claims Commission of 1868 declared that "a sufficient basis for judging the evidential value of the documents . . . is the circumstance that the Government of

¹⁷⁵ *Law and Procedure* (1926) 191. Cf. sec. 93, *infra*.

¹⁷⁶ *Norwegian Claims* (United States v. Norway), June 30, 1921, *Counter Case of the United States* (Washington, 1922) 52-55; *Proceedings* (The Hague, 1922) 18-23; *Royal Bank of Canada and Central Costa Rica Petroleum Co. case* (Gt. Britain v. Costa Rica), Jan. 12, 1922, *Counter-Case of Costa Rica* (Washington, 1923) 2, 5.

¹⁷⁷ *Introdução e actas* (1911), vol. I, p. 26, translation.

the United States has presented them as documents signed by an American officer, and that the Government of Peru has had them under its control for a long time." He added with reference to certain declarations and copies of contracts submitted by Peru that it was sufficient that their authenticity had "been guaranteed by the two Governments and not contradicted by the Agents."¹⁷⁸

A rule that seems to embody a sound practice is that adopted by the Spanish Treaty Claims Commission to the effect that "objection to the sufficiency of the authentication of documentary evidence should be made before the hearing of a case" and that reasonable opportunity would thereupon "be given to cure any defect" in the authentication.¹⁷⁹

Section 59. Certified Copies of Original Documents. Duly certified copies of original documents, whether public or private, are admitted as a matter of ordinary routine in international judicial proceedings. In municipal proceedings, on the contrary, copies are only admitted exceptionally and under certain specifically prescribed conditions. Anglo-American law is somewhat more liberal than civil law procedure in this respect, but even there the limitations on the use of certified copies are extensive and technical. In general, duly certified copies of private documents may only be submitted when it is clearly established that the original is not available.¹⁸⁰ As to public documents, the rules are more liberal, permitting the use of printed texts from official publications, and in certain circumstances, properly certified copies of other public records.¹⁸¹

In French procedure, however, the use and value of copies are narrowly circumscribed. "In principle," say Colin and Capitant, "only the original of a deed has evidential value. The copies are only evidence of that which is contained in the original, and the presentation of the original deed can always be demanded."¹⁸² It is only when the original deed no longer exists that the copy acquires probative value. Copies issued by the notary who has the original, which is bound in his record book, then have the same

¹⁷⁸ *Ruden and Co. case*, ms. *Proceedings and Awards* (1868) 331, translation. Wigmore states that authentication is not necessary in Anglo-American procedure under the following circumstances: (1) "When the execution of a document is *not in issue*, but *only the contents* or the fact of the existence of a document"; (2) "when the execution of a document, though claimed by one party, is judicially admitted by the other and thus the issue is waived"; (3) "when the opponent has destroyed or suppressed the instrument in question." IV Wigmore's *Evidence* 549-551.

¹⁷⁹ *Documents and Opinions to June 13, 1903*, p. 16.

¹⁸⁰ II Wigmore's *Evidence* 743-744. For a detailed analysis of the rules relating to the production of documentary originals, see *ibid.* 718-934. Compare Art. 427 of the German Code of Civil Procedure (1933).

¹⁸¹ Greenleaf, *op. cit.*, vol. I, pp. 627-632; III Wigmore's *Evidence* 618-634. For a complete discussion of the rules relating to public documents, see *ibid.* 383-634, and also vol. IV, secs. 2128-2169.

¹⁸² Colin and Capitant, *op. cit.*, vol. II, p. 427, translation.

force as the original.¹⁸³ In the case of an "*acte sous-seing prive*," that is, a document privately signed, and not executed before a notary, a copy never has any probative value unless it is registered with the notary. Copies of copies, however, may only serve as simple papers (*renseignements*).¹⁸⁴ No such distinction as this exists in international procedure, the only interest of the tribunal being in the establishment of the existence of the original through an authentic and credible copy.

In accord with their customary liberal practice, international tribunals accord no particular efficacy to the originals of documents unless they are of such a character as to make adequate proof by authenticated copies impracticable, or unless because of their peculiar character it seems essential to examine the originals.¹⁸⁵ The use of certified copies appears to be regarded as a normal procedure both under the Hague Convention of 1907, and in the proceedings of the Permanent Court of International Justice.¹⁸⁶ It is frequently provided that, upon demand, certified copies shall be furnished to the other party of documents in the exclusive possession of a party, copies of which have not been annexed to the written pleadings.¹⁸⁷ The Protocol of April 24, 1934, between

¹⁸³ See Article 1335 of the French Civil Code, Cachard, *op. cit.* 367-368. For parallel provisions, see *Code civil italien*, promulgue la 25 juin, 1865, traduit annoté et précédé d'une introduction par Henri Prudhomme (Paris, 1896), Arts. 1333-1339, inclusive, pp. 310-311.

¹⁸⁴ Colin and Capitant, *op. cit.*, vol. II, pp. 427-428. See also Lessona, *op. cit.*, vol. III, pp. 228-236, 304-305, 316-317, 456-457; Bodington, *op. cit.* 11, 30-31.

For the rules relating to the admission of copies in German procedure, see Arts. 435, 440 and 441 of the Code of Civil Procedure (1933).

¹⁸⁵ Comision Dominicana de Reclamaciones de 1917, Instructions to Claimants, Arts. 2, 8-9, *Informe Final* (Santo Domingo, 1920) 83, 84. The production of duly signed or authenticated copies of original maps or surveys may be essential. *Chamizal Arbitration*, Appendix to the Case of the United States, *Proceedings in Chamizal Case No. 4 before the International Boundary Commission, United States and Mexico*, Oct. 29, 1895, July 17, 1896, pp. 109-213.

In her Counter-Case in the *Alaskan Boundary Arbitration* Great Britain reserved the right to challenge, with respect to documents printed as annexes to the *Case of the United States*, the originals of which had not been made accessible to her "either the correctness of the copy printed, the accuracy of any translation, or the completeness of any extract." *Proceedings* (1904), vol. 4, p. 66. Attention has already been called to the necessity of making available under certain circumstances the originals of documents of which copies only have been presented. *Supra*, secs. 22, 23.

However, see *Delagoa Bay Railway case* (United States and Gt. Britain v. Portugal), June 13, 1891, Order of Arbitral Tribunal as to procedure, Aug. 13, 1891, Art. III, II Moore's *Arbitrations* 1877.

¹⁸⁶ Hague Convention of 1907, Art. 64, see Appendix IV; Statute of the Permanent Court of International Justice, Art. 43, see Appendix I.

¹⁸⁷ *Alaskan Boundary Arbitration* (United States v. Gt. Britain), Jan. 24, 1903, Art. II, 1 Malloy's *Treaties* 788; *British Guiana-Brazilian Boundary Arbitration*, Nov. 6, 1901, Art. VI, 94 Br. and For. St. Paps. 23, 26; *Orinoco Steamship Co. case* (United States v. Venezuela), Feb. 13, 1909, Art. VIII, 2 Malloy's *Treaties* 1886; *Savarkar case* (France v. Gt. Britain), Oct. 25, 1910, Art. III, 103 Br. and For. St. Paps. 295, 296. See also *Norwegian Claims*

the United States and Mexico went so far as to provide that it should "not be necessary to present original evidence" but that all documents submitted as evidence should be "certified as true and complete copies of the original" if they were such. If a document were not a true and complete copy of the original that fact was required to be stated in the certificate.¹⁸⁸

It has also been a general practice, in the case of official papers on file in the archives of either party, which could not conveniently be withdrawn, to permit the filing of copies duly certified by the appropriate officials.¹⁸⁹

Section 60. Method of Authentication: In General. In general, no hard and fast rule can be stated either as to the mechanical procedure or as to the person by whom an authentication must be carried out to make a document acceptable in international judicial proceedings. The controlling principle, as stated in section 58, is that the authentication must be by a person in a position to give adequate assurance that the document or signature is what it purports to be, and that his signature and seal must in turn be certified by responsible officials acceptable to the tribunal.¹⁹⁰ So long as the authentication satisfies that requirement, no technical questions will ordinarily be raised requiring the performance of the act by any particular individual.

(United States v. Norway), June 30, 1921, *Case of the United States*, p. 6; *Salem Claim* (United States v. Egypt), Jan. 20, 1931, *Counter-Case of the United States*, Dept. of State Arbitration Series No. 4 (1) (Washington, 1932) 330.

"The Board have published rules of evidence, by which their decision upon the claims presented, must be governed, & there is no testimony in the case taken according to those rules. The certificates presented to the Mexican Government, not having been recognized as evidence, cannot be admitted as such by the Board without proper authenticity. They were not originals, but purporting to be copies, & without some evidence of the fact the Board will not presume that they are authentic.

"The fact that these copies of certificates were sent to & received by the U. S. Minister, does not strengthen the testimony in regard to them. It does not appear that the Claimant could not have obtained proper evidence, as well from Mr. Chapman as from the collector at Saltillo to establish his claim; Not having done so, & having failed to establish his case by positive proof, the Board is of opinion that the claim is not valid, & the same is accordingly not allowed." *Marks* case (Board of Commissioners), Act of March 3, 1849, ms. *Opinions*, 1849, vol. 2, pp. 622, 624.

¹⁸⁸ Art. 6 (n), 4 *Treaties, Conventions*, etc. (1923-1937) 4494.

¹⁸⁹ United States-British Mixed Claims Commission of 1871, Rules, Art. 9, Hale's Report (1874) 171, 179; United States-Venezuelan Mixed Claims Commission of 1903, Rules, Art. VIII, Ralston's Report (1904) 7; United States-Chilean Mixed Claims Commission of 1892, Rules, Art. XVI, *Minutes of Proceedings* (1894) 24; United States-German Mixed Claims Commission of 1922, Rules, Art. V (a), Bonyng's Report (1934) 261; Tripartite Claims Commission (United States v. Austria and Hungary), Dec. 12, 1925, Rules, Art. VIII (c), Bonyng's Report (1930) 47, 52. See also Rules of the Court of Claims, *Opinions in French Spoliation Cases* (1912) 16-17.

¹⁹⁰ See *supra*, p. 191.

In Anglo-American law, if a document bears certain purporting official seal impressions, there is a presumption of the genuineness of the seal and of the document to which it is affixed. This presumption applies in favor of the seal of a foreign state, of the United States, of the several States of the United States, of any court within its jurisdiction and of a notary public within the limits of his authority.¹⁹¹ Certification of copies of public records is usually made by the officer having lawful custody of the records, who has generally by implication of his office the authority to certify copies. His signature, in turn, is as a rule authenticated under the hand and seal of a further officer, either his immediate superior or some other official with authority to certify under seal to the genuineness of the signature.¹⁹²

Section 61. The Same: Public Documents. With reference to public documents the primary certification as to the genuineness of the document if the original be submitted, or of the authenticity of the copy, if a copy be submitted, must be made by the official custodian of the records who is in a position to know the genuineness of the records, and who has authority, by virtue of his office, to make appropriate certification with reference to them. Ordinarily the genuineness of his seal and signature must be further authenticated under the seal and signature of an official, or officials, with a rank of a character to render unnecessary the verification before the tribunal of his seal and signature. The authentication necessary to satisfy the latter requirement varies according to the circumstances of the particular case. It is a safe procedure to have the ultimate authentication made by the Minister of Foreign Affairs of the state from which the documents come, although it can not be said such authentication is essential. Authentication by the chief of the office in which the documents are deposited may well be accepted as sufficient, as he is in the best position to know the genuineness of the documents. Thus in his

¹⁹¹ IV Wigmore's *Evidence* 595-622. Wigmore says that aside from the foreign seal of State, the "only foreign official seal presumed at common law to be genuine, by universal concession was that of a notary." Occasionally the seal of the Secretary of State, or of Foreign Affairs of a foreign government has been treated on the same footing as the seal of State. *Ibid.* 609-613.

"The history of the seal is the history of an epoch in our law. It is the source of rules distinguishing the Anglo-American system of law from its predecessors. Out of the use of the seal grew the two great doctrines of the authenticity and of the indisputability of written instruments." IV Wigmore's *Evidence* 595.

¹⁹² III Wigmore's *Evidence* 525-526, 552, 554, 567.

"Consuls, it is said, are officers known to the law of nations and are entrusted with high powers. This is very true, but they do not appear to be entrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws. They can grant no official copies of them. There appears to be no reason for assigning to their certificate respecting a foreign law any higher or different degree of credit than would be assigned to their certificate of any other fact." Chief Justice Marshall in *Church v. Hubbard*, 2 Cranch 186, 236 (1804).

award in the *Palmas Island* case Judge Huber in speaking of certain contracts or conventions between the Dutch East India Company and native chieftains said that the authenticity of the copies submitted could not be questioned as they had been certified "by evidently the competent officials of the Netherlands Government."¹⁹³ It is unfortunate that the Arbitrator did not indicate specifically the positions held by the officials by whose certification he considered himself to be bound.

In the *Misiones Boundary Arbitration* between Argentina and Brazil under the treaty of September 7, 1889, certain copies of ancient documents from the archives of Spain were certified as true copies by the "Chief Clerk of the Department in the absence through sickness of the Secretary of State." In other instances the primary certification was by "an officer of the 1st class in the Professional Corps of Record Keepers, Librarians, and Antiquaries," with successive authentications of signatures and seals by the Director General of the Archives of Simancas, the Director General of Public Instruction, the Minister of the Interior, and the Secretary of the American Legation at Madrid. The latter was probably included because the arbitration was before the President of the United States.¹⁹⁴ Another example is that of the boundary arbitration under the treaty of February 3, 1876, between Argentina and Paraguay, in which the primary certification of copies of certain documents from the Archives of Asuncion was made by the Escribano Mayor de Gobierno, and the final authentication by the Minister of Italy in Buenos Aires.¹⁹⁵

Illustrations need not be multiplied. Numerous instances can be cited in which the ultimate certification was by the Minister of Foreign Affairs.¹⁹⁶ In the *Wilson* case before the United States-Mexican Mixed Claims Commission of 1839, the Umpire ruled, upon

¹⁹³ *Arbitral Award* (The Hague, 1928) 42. Cf. *supra*, p. 131, and *infra*, sec. 93.

¹⁹⁴ *Statement submitted by the United States of Brazil to the President of the United States*, etc. (New York, 1894), vol. III, pp. 27-67.

¹⁹⁵ *Chaco-Paraguay, Memoria presentada al arbitro por Benjamin Aceval* (Asuncion, 1896) 56. The Chargé d'Affaires of Italy at Asuncion at the request of the Paraguayan Foreign Minister compared the copies with the originals and authenticated the signature and seal of the Minister of Foreign Relations. The Chargé's signature and seal was then in turn authenticated by the Italian Minister at Buenos Aires. The latter step appears to represent an excess of caution.

¹⁹⁶ *French Indemnity, Domestic Commission, Act of July 13, 1832*, 5 Moore's *Adjudications* 404 ("The acts of executive officers were commonly proved by certificates from the French archives attested by the proper officers, and verified by the minister for foreign affairs"); *Orinoco Steamship Co. case* (United States v. Venezuela), Feb. 13, 1909, 2 Malloy's *Treaties* 1886, Art. VIII ("... documents . . . shall be authenticated by the respective Minister for Foreign Affairs"); *Haitian-Dominican Boundary Arbitration*, July 3, 1895, *Memoria que la legación extraordinaria de la República dominicana en Roma presenta a la santidad de Leon XIII*, pp. 43-86 ("Dominican Republic By certified copy . . . The Chief of the Bureau").

the request of the United States, that the authenticity of an alleged copy of certain provisional rules for Mexican Consuls must be authenticated under the great seal of the Republic of Mexico.¹⁹⁷ The authentication may vary according to the nature and importance of the document. The guiding principle is always the same, namely, that the ultimate seal and signature be familiar to the tribunal, or that they be those of an officer holding a position of such rank that their genuineness requires no proof.

Section 62. The Same: Private Documents. The authentication of private documents presents a somewhat different problem. It can be stated as a general rule that such documents will be accepted when authenticated in accordance with the requirements of the laws of either of the parties. Documents executed under the seal of a notary or some officer with equivalent authority to administer oaths will normally be accepted as having been executed by the person whose signature they purport to bear.¹⁹⁸ If not under seal, the authenticity of a document would usually be proved by witnesses in municipal proceedings. In the absence of the use of witnesses in international proceedings, this may be accomplished by a written declaration by a witness under oath, attached to the document in question. A formal document constituting the essential basis of a claim and not legally proved according to the law of the place where it purports to have been executed may be rejected as evidence.¹⁹⁹

However, authentication in accordance with the formalities of local law is not to be taken as a condition prerequisite to the acceptance of private documents. The decisive question is the establishment of the identity of the document as the act of the person or persons whose signatures it purports to bear. Any procedure

¹⁹⁷ Ms. *Minutes of Proceedings* (1839), vol. 2, pp. 21, 23. However, the Exchange of Notes of Nov. 2, 1929, in the *Shufeldt Claim* provided in paragraph 8 with respect to all documents pertaining to the subject matter of the arbitration that they might be submitted in the originals or "copies certified by a notary or public officials." Italics added. Dept. of State Arbitration Series, No. 3 (Washington, 1932) 11.

¹⁹⁸ *St. Croix River Arbitration* (United States v. Gt. Britain), Nov. 19, 1794, Order of Oct. 8, 1796, 1 Moore's *Adjudications* 62; United States-British Mixed Claims Commission, June 30, 1822, Rule adopted Dec. 29, 1824, ms. *Journal of Proceedings* (1822); United States-New Granadian Mixed Claims Commission of 1857, Rules, Arts. 5, 10, ms. *Journal of Proceedings* (1857) 10; United States-Colombian Mixed Claims Commission, Feb. 10, 1864, Rules and Regulations, Printed Circular, Aug. 24, 1865, Arts. 2, 5, National Archives of United States; Board of Commissioners, Act of March 3, 1849, Rules and Orders, April 23, 1849, Arts. 1, 4, ms. *Opinions*, 1849, vol. 1, pp. 16-17; *Hudson's Bay and Puget's Sound Agricultural Co.'s cases* (United States v. Gt. Britain), July 1, 1863, Rules, Art. IV, ms. *Proceedings and Awards of the British and American Joint Commission*, etc., pp. 10-11; United States-Spanish Mixed Claims Commission, Feb. 12, 1871, Rules, Art. VIII, III Moore's *Arbitrations* 2170; *Machado y Rivero case* (Brazil v. Bolivia), *Introdução e actas* (1916), vol. I, pp. 331, 347.

¹⁹⁹ *Raymond et al. case* (United States v. Venezuela), Feb. 17, 1903, *Ralston's Report* (1904) 250, 253-254.

establishing that fact is sufficient such as admission by the signatories, or by the parties themselves, corroborative proof from other documents, testimony of handwriting experts, et cetera. Thus while the procedure of local law offers a convenient means of establishing the authenticity of private documents, failure to comply with the technical requirements of such law will not in itself constitute a reason for rejecting documents as not being properly authenticated.²⁰⁰

Section 63. The Same: Officially Printed Records. "The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be published by the Government has led to a general concession by judicial decision or by statute," says Wigmore, "that such purporting publications, at least when in the form of the standard official documents constantly issued and referred to, are to be assumed genuine."²⁰¹ The rule is applicable to miscellaneous public documents, to court decisions, and to statutes both domestic and foreign.²⁰²

The soundness of the principle underlying this rule has been recognized in international proceedings, and provision has been made in numerous cases that official publications of laws, statutes, judicial decisions, or other public documents may be admitted or referred to without being formally proved. If referred to only, copies of the printed publications must be filed with the tribunal, or at least held in readiness for inspection by it or by the opposing party.²⁰³ In some instances the publications which may be thus used are specifically named, but such a procedure would not seem generally to be desirable unless an extensive list is set forth.²⁰⁴

²⁰⁰ *Ruiz case (Brazil v. Peru)*, *Introdução e actas* (1916), vol. I, pp. 139ff.; *Salazar y Hermano case* *ibid.*, vol. I, pp. 157ff.; *Hatton case (United States v. Mexico)*, Sept. 8, 1923, *Opinions* (1929) 6, 9; *Rademacker, Muller y Cia., Sucs., en Liquidacion case (Germany v. Mexico)*, March 16, 1925 (unpublished), cited in Feller, *Mexican Commissions*, p. 260; *Guillermo Buckenhofer case*, *ibid.* cited at p. 260.

²⁰¹ IV Wigmore's *Evidence* 579.

²⁰² *Ibid.*, vol. III, pp. 618-634.

²⁰³ United States-Chilean Mixed Claims Commission, May 24, 1897, Rules, Arts. X and XIV, *Minutes of the Commission* (1901) 25, 26; *Salvador Commercial Co. case (United States v. Salvador)*, Dec. 19, 1901, *Proceedings of Commission*, Shorthand Report, ms. National Archives of United States, Book 3, pp. 1-2; *North Atlantic Coast Fisheries case (United States v. Gt. Britain)*, Jan. 27, 1909, Art. VII, 1 Malloy's *Treaties* 839; *Royal Bank of Canada and Central Costa Rica Petroleum Co. case (Gt. Britain v. Costa Rica)*, Jan. 12, 1922, Art. 5, 116 Br. and For. St. Paps. 438, 441; United States-Mexican General Claims Commission, Sept. 8, 1923, Rules, Art. VIII (6), Mimeograph Copy, Dept. of State, Feller, *Mexican Commission*, p. 379; United States-Mexican Special Claims Commission, Sept. 10, 1923, Rules, Art. VIII (6), *ibid.* 408; Spanish-Mexican Mixed Claims Commission, Nov. 25, 1925, Rules, Art. 32, *Reglas de procedimiento* (1927); *Shufeldt case (United States v. Guatemala)*, Nov. 2, 1929, Dep't of State Arbitration Series No. 3 (Washington, 1932) 719-722; United States-Panamanian General Claims Commission, July 28, 1926, Rules, Art. 27, Hunt's Report (1934) 849.

²⁰⁴ United States-British Mixed Claims Commission, Aug. 18, 1910, Rules, Art. 21, Nielsen's Report (1926) 13.

Section 64. The Same: Literal Reproductions. Lithographic, photographic, or photostatic reproductions of original documents are sometimes used, and are useful where the form of the document is such that it cannot readily be reproduced in typed or printed copies.²⁰⁵ There may be also alterations or notations in the original which can be more clearly indicated by exact reproduction. In the absence of such peculiarities of form or content, there is no particular virtue in such reproductions.²⁰⁶ It is essential, of course, that documents purporting to be literal reproductions of originals be duly authenticated as such in the same manner as other reproductions.

Section 65. The Same: The Permanent Court of International Justice. The Permanent Court of International Justice appears to have followed a flexible and pragmatic practice in the matter of the authentication of documents. Fachiri states that "no special rules have been laid down as to the mode of proving documents produced as evidence." He adds:

"The agents should hand in the originals to the Court whenever possible or, failing the originals, certified copies, but in most cases authenticity is not in question. In the event of the authenticity of a document being disputed it would be for the party producing it to satisfy the Court by such evidence as was deemed appropriate."²⁰⁷

The authenticity of a document must be duly established, however, if it is to be accepted as part of the evidence no matter how slight its importance may be.²⁰⁸ The opposing party, of necessity, has the privilege of meeting if he can any challenge to the authenticity of a document or to the insufficiency of an authentication.

The original of every document of the written proceedings must be signed by the agent of the party submitting it, and, apparently, the agent's certification of copies of documents as true copies of the originals sometimes constitutes the only authentication offered.²⁰⁹ League of Nations' documents submitted with respect to advisory cases have been certified by the directors of the sections of the Secretariat from which they emanate, or by the

²⁰⁵ Litigio de Limites entre el Ecuador y el Peru. *El memorandum final del Peru. Contramemorandum de Honorato Vazquez* (1909) 24; *Fur Seal Arbitration* (United States v. Gt. Britain), Feb. 29, 1892, *Case of the United States*, Appendix (Washington, 1895), vol. I, p. 591. See *Aristotelis A. Megalidis v. Etat turc* (Greek-Turk Mixed Arbitral Tribunal) 8 *Recueil des décisions* 386, 392, 394 (1928).

²⁰⁶ *Palmas Island case* (United States v. Netherlands), Jan. 23, 1925, *Arbitral Award* (The Hague, 1928) 42.

²⁰⁷ A. P. Fachiri, *The Permanent Court of International Justice*, 2d ed. (London, 1932) 119.

²⁰⁸ *Lighthouse case between France and Greece*, Series C, No. 74, p. 220. Cf. *supra*, p. 14.

²⁰⁹ 1936 Rules, Art. 40, par. 1. See, for example, *Treaty of Neuilly, Article 179, Annex, Paragraph 4*, Series C, No. 6, pp. 47ff.; Series E, No. 8, p. 259.

principal officers of other League organizations which are principally interested in the subject matter of the document, or under whose supervision it has been drafted.²¹⁰ Similarly in the case of private organizations which have been permitted to file documents in advisory cases, the documents have been certified by a responsible officer of the organization, such as its secretary.²¹¹ Copies of decisions of courts, such as the Mixed Arbitral Tribunals, have been accepted with a certification by the President or the secretary of the Court.²¹² In the case of a document submitted by a state, certification by the head of the department of its government having custody of or responsibility for the original record has been accepted as satisfactory authentication.²¹³ This is a less stringent requirement than that ordinarily enforced in *ad hoc* tribunals, and it is to be doubted whether such authentication would be accepted as sufficient if challenged.²¹⁴ The primary consideration in each case seems to have been that the responsibility of the organization or government for the authenticity of the documents submitted by it, or on its behalf, shall be engaged through a certification by the principal officer charged with the custody of the document. The Court has been concerned essentially with the fact of authenticity and has shown no inclination to question the form of authentication so long as it furnished adequate assurance of that fact.

Section 66. Conclusiveness and Effect of Authentication. In the decided cases, tribunals appear to have devoted their attention to the nature and sufficiency of the authentication rather than to its conclusiveness and effect with reference to the execution or genuineness of the instrument, and to the truth of the contents. On principle it would seem that an adequate authentication should raise a presumption both of the fact of execution and the genuineness of the instrument, and of the truth of the facts set forth in it. Such a presumption would be subject to rebuttal, and could not be conclusive upon the tribunal, which would remain free, in

²¹⁰ See, for example, *Nomination of Netherlands Delegate at the Third Session of the International Labor Conference*, Series C, No. 1, pp. 38, 345-459; *Competence of the International Labor Organization to Regulate, Incidentally, the Personal Work of the Employer*, Ser. C, No. 12, pp. 83-136.

²¹¹ See *Competence of the International Labor Organization to Regulate, Incidentally, the Personal Work of the Employer*, Series C, No. 12, pp. 232-253.

²¹² See *Appeals from Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal*, Series C, No. 68, pp. 29-33.

²¹³ Series E, No. 8, p. 259. See discussion of the comparative accuracy of the English and French versions of a report to the Council of the League of Nations by Viscount Ishii, during the hearings in the case concerning *Access to or Anchorage in the Port of Danzig of Polish War Vessels*, Series C, No. 55, pp. 311-312, 342-346.

²¹⁴ See *supra*, sec. 58, especially pp. 190-191.

accordance with the principles previously stated, to evaluate the effect of the evidence under the authentication.²¹⁵

Such a conclusion seems warranted by reference to analogous rules of municipal law. In general in Anglo-American law authentication is primarily a matter of sufficiency rather than of presumption. If the court finds that an authentication offered meets the requirements as to sufficiency, the documents go to the jury, and any evidence offered in rebuttal must then be addressed to the jury. The jury being in a position similar to that of the tribunal in international proceedings is with the exception of certain specific rules as to presumption,²¹⁶ free to weigh the evidence without being subject to any compulsory rules concerning the effect of the authentication.²¹⁷ However, a properly authenticated copy of an instrument is sufficient *prima facie* proof of its existence and execution, and official certificates are *prima facie*, but not conclusive evidence, of the facts stated in them.²¹⁸ In the absence of countervailing proof, documents thus authenticated would normally be accepted as sufficient evidence to establish the facts to which they properly related.

Documents formally executed before a public officer, competent to perform such execution in civil law countries, such as France, are accorded much greater weight in the procedure of those countries than duly authenticated documents of any character in Anglo-American procedure. Such documents, usually referred to as *preuve constituée*, *prueba constituida* or *actes authentique*, in fact, furnish conclusive proof of all acts of the officer himself, and of all statements by him of things which happened in his presence, or of facts within his personal knowledge.²¹⁹ Such an *acte authentique* may be attacked in French procedure only through a cumbersome procedure known as *inscription de faux*, that is, an indictment or charge of falsity.²²⁰ As compared

²¹⁵ With reference to the effect of authentication in German procedure, see Arts. 415 and 417 of the Code of Civil Procedure of 1933. Also cf. *supra*, sec. 4.

²¹⁶ These exceptions relate chiefly to presumptions in the case of documents under seal, and to ancient documents. For definition of ancient documents, see *supra*, p. 148, note 40. IV Wigmore's *Evidence* 555, 575.

²¹⁷ *Ibid.* 554-555.

²¹⁸ 22 Corpus Juris 969, 972.

²¹⁹ See Capitant, *op. cit.* 365, 366; Bonnier, *op. cit.* 399-400, 519, 528; Colin and Capitant, *op. cit.*, vol. II, pp. 420-422; Bodington, *op. cit.* 13-15; German Code of Civil Procedure of 1933, Art. 415.

It should be observed, however, that such documents furnish proof only that the act or declaration of a party before the authority took place, not that the declaration was correct. Special probatory value may be given the document by statute, as, for example, in the case of a birth certificate.

As to the special position of the notary in France, see O. S. Tyndale, "The organization and administration of justice in France," XIII Canadian Bar Rev. 580-581 (1935).

²²⁰ For description of this action, see Garsonnet and Cézard Bru, *op. cit.* 300-306.

with documents privately drawn and executed (*actes sous seing prive*), *actes authentique* have a tremendous superiority, all the presumption of the law being in favor of the validity of the authentication of the public officer, especially of the notary.²²¹

There is no comparable documentary evidence in either Anglo-American or international procedure. Authentication under the great seal of state of a party, or of the seal of a high officer of the government perhaps approaches it in international procedure, at least as to the genuineness of a purported original document or as to the accuracy of a certified true copy. The truth of the facts set forth in a document under such authentication would ordinarily be accepted as sufficiently established in the absence of rebutting evidence, subject to the right of the tribunal to evaluate them in the light of the other evidence submitted in the case.²²²

Section 67. Translations. The matter of translations of pleadings and evidence becomes one of considerable moment in cases where the countries concerned use different languages and the arbitral tribunal is composed of members using differing languages. The consideration of paramount importance in the matter is that pleadings and evidence should be readily intelligible to the members of the tribunal. How important it is to have these documents in a language which the members of the tribunal can read and understand with facility will become apparent from an examination of the extent of the pleadings and the volume of the evidence submitted in the average arbitration. It is to the interest of the parties not to require arbitrators to struggle through a voluminous record in an unfamiliar language. Not infrequently, however, the language to be used by the parties and the tribunal in the proceedings is prescribed in the arbitral agreement itself before the arbitrators have been selected.²²³ In such cases and not infrequently also in others, the language equipment of available jurists exercises a decisive influence on the choice of arbitrators. The

²²¹ See Bodington, *op. cit.* 28.

²²² Cf. *supra*, secs. 58, 60.

²²³ *Venezuelan Preferential* case (Germany, Gt. Britain and Italy v. Venezuela), May 7, 1903, Art. 4 (English—any other language with the permission of the tribunal), *Recueil des Actes et Protocoles* (The Hague, 1904) 20; *Casablanca* case (France v. Germany), Nov. 25, 1908, Art. 6 (German or French), *Protocoles des Séances* (The Hague, 1908) 6; *Grisbadarna* case (Norway v. Sweden), March 14, 1908, Art. 7 (English, French or German, "as may be decided in consultation with the other members. For petitions, evidence and directions, the parties may use the language of either country, the tribunal retaining the right to have translations made"), Hague Court Reports (1916) 498; *North Atlantic Coast Fisheries* case (United States v. Gt. Britain), Jan. 27, 1909, Art. 9 (English), 1 Malloy's *Treaties* 840; *Savarkar* case (France v. Gt. Britain), Oct. 25, 1910, Art. 5 (French or English), *Protocoles des Séances et Sentence* (The Hague, 1911) 6, 8; *Russian Indemnity* case (Russia v. Turkey), July 22/Aug. 4, 1910, Art. 5 ("French is the only language which the tribunal may use and which may be used before it"), *Protocoles des Séances et Sentence* (The Hague, 1912) 8.

practice generally followed in establishing claims commissions is to leave the regulation of the matter of language to be determined by the necessities of the situation after the organization of the tribunal.

In the absence of provisions in the arbitral agreement or in the rules of procedure, each party is free to submit pleadings and evidence in its own language without accompanying translations. There is no uniformity of practice in cases in which translations are required. It may be required that the evidence submitted, including the testimony of witnesses, if any, be all translated into one language;²²⁴ that the evidence in each language be accompanied by translations into the other;²²⁵ that it be submitted in either language, subject to the right of the other party to demand a translation;²²⁶ or that it may be submitted in either.²²⁷ The com-

²²⁴ Board of Commissioners, Act of March 3, 1849, Rules and Orders, April 23, 1849, Art. 5, Printed Circular, National Archives of United States; United States-Colombian Mixed Claims Commission, Feb. 10, 1864, Rules and Regulations, Aug. 24, 1865, Art. 6, Printed Circular, National Archives of United States; United States-Costa Rican Mixed Claims Commission, July 2, 1860, Rules of Procedure, Art. 6, III Moore's *Arbitrations* 2143.

²²⁵ United States-Mexican Mixed Claims Commission, April 11, 1839, Rules of Procedure, ms. *Minutes of Proceedings* (1839), vol. I, p. 65; *Masica Incident* case (Gt. Britain v. Honduras), April 4, 1914, Art. V, 10 A.J.I.L., Supp. 98. The United States-Spanish Mixed Claims Commission, Feb. 12, 1871, on motion of the advocate of Spain, adopted the following order on March 23, 1872, concerning the translations:

"In all cases heretofore filed before this Commission the memorials, exhibits, and testimony now on file in the English language shall be translated into Spanish, and such translations shall be furnished and filed by the respective claimants, on or before the first day of June 1872.

"In all cases of memorials, or of exhibits and testimony hereafter to be filed the claimants are required to furnish such translations and to file the same together with the English originals. Of the printed copies now required by the rules, fifteen shall be in English and fifteen in Spanish. Printed briefs and arguments may be filed in the English language, only, as heretofore." III Moore's *Arbitrations* 2171.

"XVII. Motions, demurrers, and written arguments shall be in the English language. Memorials shall be in English and Spanish. All depositions which may be taken outside of the United States under these rules shall be taken in the language which the witness ordinarily uses, and if in any language other than the English, the testimony shall be accompanied by a faithful translation into English. All documentary evidence shall be submitted in the original language in which it is written, and if in Spanish, shall be accompanied by a faithful translation into English." United States-Chilean Mixed Claims Commission, Aug. 7, 1892, Rules of Procedure, III Moore's *Arbitrations* 2234.

²²⁶ British-Mexican Claims Commission, Nov. 19, 1926, Rules of Procedure, Arts. 49-51, *Decisions and Opinions*, pp. 16-17; French-Mexican Claims Commission, March 25, 1925, Rules of Procedure, Arts. 47-49, *Règlement de procédure* (1925) 16; Italian-Mexican Commission, Jan. 13, 1927, Rules of Procedure, Dec. 6, 1930, Arts. 45-47, *Reglas de procedimiento* (1931) 17-18; British-Venezuelan Mixed Claims Commission, Feb. 13, 1903, Rules of Procedure, Arts. III, IV, Ralston's Report (1904) 296.

²²⁷ United States-Mexican Mixed Claims Commission, July 4, 1868, Rules of Procedure, Aug. 10, 1869, Art. 6, III Moore's *Arbitrations* 2146; Brazilian-Bolivian Mixed Claims Commission, Rules of Procedure, July 8, 1905, Art. 2, Helio Lobo's Report (1910) 159; United States-Panamanian General Claims Commission, July 28, 1926, Rules of Procedure, April 1, 1932, Art. V, Hunt's Report (1934) 848.

mon purpose seems to be to meet the needs of the arbitrators as far as possible without burdening the parties unduly.²²⁸

In proceedings before the Permanent Court of International Justice, a different situation obtains. In establishing the Court, it was impossible to allow parties appearing before it unlimited discretion in the choice of languages, in view of the unavoidable language limitations of the judges, and the consequent necessity of restricting translations in the interest of economy of time and of uniformity. French and English were therefore declared, in Article 39 of the Statute, to be the official languages of the Court, the parties having the right to agree that the case should be conducted in either of those languages. In the absence of an agreement as to the language to be employed, each party may use in the pleadings the language which it prefers.²²⁹ The Court may, at the request of any party, authorize a language other than French or English to be used, a power which it has exercised on a number of occasions. In the latter event, however, a translation into French or into English must be attached to the original of each document submitted.²³⁰ The Registrar is not bound to make translations of documents of the written proceedings.²³¹

Whenever a language other than French or English is employed with the authorization of the Court, the party concerned must make the necessary arrangements for translation into one of the official languages. However, the evidence of witnesses and the statements of experts are translated under the supervision of the Court.²³² "When authorizing the use of a language other than one of the official languages, the Court has regarded the translation into one of these languages made on behalf of the party concerned as the authentic version."²³³

²²⁸ See, for example, the varied rules adopted by the different Mixed Arbitral Tribunals. *Recueil des décisions*, vol. 1, *passim*.

²²⁹ "Should the parties agree that the proceedings shall be conducted in French or in English, the documents shall be submitted only in the language adopted by the parties.

"In the absence of an agreement with regard to the language to be employed documents shall be submitted in French or in English." Rules (1936), Art. 39.

²³⁰ Rules (1936), Art. 39; Series E, No. 3, p. 200. Art. 43 provides in paragraphs 2 and 3:

"2. Any document filed as an annex which is in a language other than French or English, must be accompanied by a translation into one of the official languages of the Court. Nevertheless, in the case of lengthy documents, translations of extracts may be submitted, subject, however, to any subsequent decision by the Court or, if it is not sitting, by the President.

"3. Paragraphs 1 and 2 of the present article shall apply also to the other documents of the written proceedings."

²³¹ Rules (1936), Art. 39.

²³² Rules (1936), Art. 58 (2). "In the case of witnesses or experts who appear at the instance of the Court, arrangements for translations shall be made by the Registry."

²³³ Series D, No. 2 (3d add.), p. 823. Report by Registrar, June, 1935.

The Permanent Court has thus developed a set of rules with respect to language well adapted to the needs of the varied parties appearing before it. Its effectiveness, however, in relation to the judges is due to the very efficient system of translations which is used. At the oral hearings an interpretation from the official language used into the other is made immediately after each statement, and if a third language is used interpretation is made into the official languages.²³⁴ The Registry of the Court makes a translation of documents submitted for the use of the judges.²³⁵

The Registrar adds that the Court has had no experience except as concerns isolated statements, or statements made in an unofficial language.

Likewise, if a witness uses another language than one of the official languages, the translation of his testimony is the authentic version. Series E, No. 3, p. 201.

The persons making these translations must make the following declaration in Court: "I solemnly declare upon my honour and conscience that my translation will be a complete and faithful rendering of what I am called upon to translate." Rules (1936), Art. 58 (3).

²³⁴ While the language equipment of the various judges and of the agents makes this procedure almost a necessity, it is a monotonous procedure and undoubtedly exercises an adverse influence on the effectiveness of oral arguments before the Court.

²³⁵ Hudson, *Permanent Court*, p. 499. A party is not entitled to a translation from one official language into another, but the Registry will usually communicate its own translation to the parties. *Ibid.* 482, note 34.

The documents of the proceedings, with the exception of the minutes of the public sittings of the Court, including orders, judgments, opinions, etc., are published in the official reports only in the language in which they are submitted, even when that is not an official language.

CHAPTER VI

TESTIMONIAL EVIDENCE

IN GENERAL

Section 68. Use in International Judicial Procedure. "Testimonial evidence," says Lessona, "consists of judicial assertions made by persons strangers to the controversy."¹ From this it follows that such evidence is not limited to assertions made in court, although evidence given orally in court is the commonest class of testimonial evidence.² In French procedure testimonial evidence [*preuve testimoniale*], as contrasted with written evidence [*preuve litterale*], consists very largely of oral or parol evidence given in a special interlocutory proceeding before a *Juge-Commissaire*, called an *enquête*.³ Witnesses seldom give their evidence directly in open court, testimonial evidence being generally presented to the court in the form of depositions taken in an *enquête*. Similarly in international judicial procedure testimonial evidence is used, not infrequently, in the form of depositions, but as elsewhere pointed out, it is only rarely that the testimony of witnesses is taken directly before the tribunal.⁴

The sparing use of direct testimonial evidence in international procedure is due principally to practical considerations, rather than to any technical rules limiting the intrinsic merit or the admission of testimonial evidence as such. When provision is made in the arbitral agreement for the use of testimonial evidence, the rules concerning its admission are basically the same as those for any other kind of evidence. Although the right of cross-examination is usually assured when witnesses are to be examined, it does not seem that any technical rules would be applied with reference to

¹ *Op. cit.*, vol. IV, p. 5.

² I Wigmore's *Evidence* 860.

³ A. C. Wright, "French and English Civil Procedure," XLII Law Q. Rev. 341-342. Also see *infra*, sec. 76.

⁴ "The President thought that the system provided for in the Statute and Rules was the only one appropriate to an international tribunal such as the Court, where, save in exceptional cases, evidence would be furnished by the parties in written form. And the system of the Statute (more especially Article 43) was that evidence would in principle be in writing, the production of oral evidence being additional and optional." Series D, No. 2 (3d add.), p. 182. See also *supra*, sec. 42 and *infra*, sec. 73.

the exclusion of statements by the witnesses.⁵ Thus on the one occasion when the Permanent Court of International Justice heard witnesses orally, "it gave the parties wide latitude in putting questions, reserving its appreciation of the importance to be attached to the questions put and the replies given."⁶ On one occasion, "the President reminded the witnesses that their 'evidence given at the hearing must be entirely confined to matters of fact without entering into questions of the construction of the German-Polish Convention.'"⁷

One or two claims commissions have, however, given effect to the basic principle of the civil law as to the inferior value of oral evidence in rejecting it, when standing alone, as constituting sufficient basis for an award. The Brazilian-Peruvian Arbitral Tribunal in the *Ruiz* case declared that the evidence being exclusively oral did "not merit being considered . . . as elements of proof" of damages.⁸ In its *Memoire* before the Franco-Chilean Tribunal of 1901 Peru, who also came in as a party, declared concerning oral evidence, after asserting that documentary evidence and the testimony of experts constituted the best means of proof:

"As to proof by witnesses it presents many practical difficulties in international arbitrations; therefore, it is only proper to admit it in a case where it is indispensable."⁹

A tribunal may, in pursuance of the "best evidence" principle, refuse to accept oral evidence as sufficient proof of important facts such as citizenship or title to real estate, especially where no showing has been made of the impossibility of obtaining documentary proof.¹⁰

⁵ International Boundary Commission (United States v. Mexico), March 1, 1889, Rules, Art. VIII, *Chamizal Arbitration, Case of the United States*, Appendix, vol. I, p. 94; *Pious Fund* case (United States v. Mexico), May 22, 1902, Art. V, 1 Malloy's *Treaties* 1196; Tripartite Claims Commission (United States v. Austria and Hungary), Dec. 12, 1925, Rules, Art. VIII (b), Bonyng's Report (1930) 52. See also *infra*, sec. 72.

⁶ Hudson, *Permanent Court*, p. 502, citing Series C, No. 11 (vol. I), pp. 25-37.

⁷ *Ibid.* 504-505. See also Series D, No. 2 (3d add.), pp. 201-203.

⁸ *Introdução e actas* (1916), vol. I, pp. 359, 366. Oral evidence was held to be insufficient on similar grounds in two other cases: *Rivera* case, *ibid.*, vol. II, pp. 129, 135; *Reategin y Hermano* case, *ibid.*, vol. II, pp. 43, 67.

⁹ *Arbitrage Franco-Chilien. Mémoire présenté par le gouvernement du Pérou* (Lausanne, 1897) 318. See also *supra*, secs. 50-51.

¹⁰ *Bleze Motte* case (United States v. France), Jan. 15, 1880, Boutwell's Report (1884) 92, 101-103; *Johnson* case (United States v. Mexico), July 4, 1868, VII ms. *Opinions* 45 (Commissioner Wadsworth for the Commission); *Pious Fund* case, *ibid.*, VII ms. *Opinions* 459, 466 (Opinion of Umpire Thornton); *Clark* case, Spanish Treaty Claims Commission, Act of March 2, 1901, "Statement of facts and Brief for Defendant," pp. 12-13, *Claimants' and Government's Briefs* (1901), vol. 12, No. 6. Cf. *Cazanas* case, "Brief for Defendant on Final Hearing," pp. 16-17, *ibid.*, vol. 11, No. 267.

WITNESSES

Section 69. Power of International Tribunals to Compel Attendance. "The efficient administration of testimonial proof," says Bonnier, "requires: (1) that the witnesses of the facts of which proof may be desired are known; (2) that they may be compelled to appear and testify in court; (3) that their testimony is true."¹¹ Elementary as these assertions appear today, they are principles that have been comparatively slow in developing in every system of law, and to this international law is no exception. In ancient Athens, the testimony of witnesses was customarily taken in writing, but they could not be compelled to appear in court.¹² The same was true at Rome, and it was not until the time of Justinian that a law was enacted making the attendance of witnesses compulsory. "Under the prior rule . . . if a person present by chance had heard or seen a legally relevant event, it rested entirely with the free will of the witness whether or not that event could be proved."¹³

In France it was not until the Ordinance of 1667 that a fine of ten livres was imposed for failure to appear and testify.¹⁴ It was not until the statute of Elizabeth of 1562-1563 that a penalty was imposed in England, and a civil action granted against any person who refused to attend after service of process and tender of expenses. As the rule developed, it was extended to include the duty to produce documents, as well as to testify personally.¹⁵

In the case of international judicial tribunals, the divided source of their authority has rendered especially slow the development of a recognized power to compel the attendance of witnesses. There is in addition the fact that much greater reliance has been placed on documentary evidence in international litigation than on testimonial evidence. On the other hand, the absence of power to compel the attendance of witnesses may be partly the cause of the reliance on written evidence. The matter has been complicated by the fact that international tribunals, having no agents of their own for the enforcement of their writs or the service of any subpoenas or commissions which they might issue, must in

¹¹ Bonnier, *op. cit.* 242.

¹² *Ibid.* 242.

¹³ Engelmann, *op. cit.* 361. Under earlier law there had been a duty to appear in cases having a public interest, and where the person had been called as the attesting witness to a solemn act.

¹⁴ Bonnier, *op. cit.* 242, 243. See also Lessona, *op. cit.*, vol. IV, pp. 179-180, 208-222.

¹⁵ IV Wigmore's *Evidence* 643-652. Perhaps one reason for the late development of the rule in English law was the fact that in earlier days the jury depended upon its own information rather than upon that furnished by witnesses.

any event rely upon the authorities of the states creating them.¹⁶ The power of the states themselves to compel the appearance of witnesses is limited to their own territory.¹⁷ Despite all these facts, there is nothing to prevent states from making adequate provision in the arbitral agreement for enforcing the attendance of witnesses. This has been done, however, in but a few instances.

One of the earliest instances in which a tribunal sought to issue commissions under its own authority compelling the attendance of witnesses occurred in the *Pelletier* case. The Protocol of May 24, 1884, submitting the case to arbitration by Justice Strong, provided in Article III:

"If, in presence of such papers and evidence so laid before him, the said Arbitrator shall request further evidence, whether documentary or by testimony given under oath before him or before any person duly commissioned to that end, the two Governments, or either of them, engage to procure and furnish such further evidence by all means within their power, and all pertinent papers on file with either Government shall be accessible to the said Arbitrator."¹⁸

Although expressing serious doubt as to his authority under the Protocol, Justice Strong signed "what purports to be a commission," with interrogatories attached, to the United States consul in Puerto Rico.¹⁹ The deposition made by the consul was subsequently admitted in evidence, subject to objection.

In the agreements creating the International Boundary Commission between the United States and Mexico, and the International Joint Commission between the United States and Canada, provision was made for compelling the attendance of witnesses. In the former case, the Boundary Convention of March 1, 1889, provided in Article VII that the commission should "have the power to summon any witnesses whose testimony it may think proper to take," and that "in case of the refusal of a witness to appear, he shall be compelled to do so, and to this end the commission may make use of the same means that are used by the Courts of the respective countries to compel the attendance of witnesses, in con-

¹⁶ For example, see the provisions in Art. 24(b) of the Rules of the Anglo-German Mixed Arbitral Tribunal, 1 *Recueil des décisions* 115, and Art. 52 of those of the Franco-German Tribunal, *ibid.* 51.

See comment on the effect of the difference in the powers of national and international tribunals in this respect in the separate opinion of the British Commissioner in the *Cameron* case before the British Mexican Claims Commission of 1926. *Decisions and Opinions*, pp. 37-38.

¹⁷ IV Wigmore's *Evidence* 655. Courts of one state will, of course, upon the receipt of a proper request, compel witnesses to answer interrogatories or make depositions for use in the courts of another state.

¹⁸ 1 Malloy's *Treaties* 933-934.

¹⁹ *Record of Pelletier Claim* (1885), vol. I, pp. 806-810; II Moore's *Arbitrations* 1755.

formity with their respective laws."²⁰ In Article XII of the treaty of January 11, 1909, between the United States and Great Britain, the high contracting parties agreed "to adopt such legislation as may be appropriate . . . to provide for the issue of subpoenas for compelling the attendance of witnesses, in proceedings before the Commission."²¹ By act of March 4, 1911, the United States authorized circuit courts of the United States in the circuit where the commission should be sitting "to make all orders and issue all processes necessary and appropriate" to compel the attendance of witnesses or the production of books and papers.²² Canada passed a similar act on May 19, 1911, authorizing the judges of Superior Courts to issue the necessary processes.²³

Faced with the imminent probability in the proceedings in the *I'm Alone* case of recalcitrant witnesses refusing to appear and testify because of the nature of the facts of the case, Congress passed the act of July 3, 1930, empowering, in section 2, any international tribunal or commission to which the United States is a party "to require by subpoena the attendance and the testimony of witnesses and the production of documentary evidence relating to any matter pending before it." It was provided that any member of the tribunal or commission might sign such subpoenas.²⁴ The

²⁰ 1 Malloy's *Treaties* 1169.

²¹ 3 *Treaties, Conventions, etc.* (Redmond, 1923) 2607.

²² 36 Stat. 1364.

²³ Statutes of Canada, 1911, 1-2 George V, Ch. 28, pp. 243-244. Rules 17 and 18 of the Commission's rules regulate the issuance of subpoenas and the compulsory attendance of witnesses, and Rule 24 the method of serving processes. *Rules of Procedure of the International Joint Commission* (Washington, 1912) 7-8.

The Agreement of Oct. 25, 1910, between France and Great Britain in the *Savarkar* case provided in Article 4 that the tribunal should "have the right to order the attendance of witnesses." *The Hague Court Reports* (1916) 281.

Similar action had been taken by the United States and Canada in connection with the Behring Sea Claims Commission provided for in the Convention of February 8, 1896. Article III of that convention provided:

"The said commission shall have power to compel the testimony of witnesses when sitting at San Francisco by application to the Circuit Court of the United States for the Ninth Circuit, which said Court shall make all orders and issue all processes necessary and appropriate to that end; and when sitting at Victoria shall have and exercise all such powers for the procurement and enforcement of testimony as may hereafter be provided by appropriate legislation." The necessary enabling legislation conferring the power upon the courts to issue the necessary processes was enacted by both states: Canada, Act of April 23, 1896, Statutes of Canada, 59 Victoria, Ch. 2, p. 17; United States, Act of Feb. 8, 1896, 29 Stat. 115.

²⁴ 46 Stat. 1005.

"The 1930 Act was drafted on the basis of several prior statutes which had conferred the power to administer oaths upon various special officials or bodies. Among the precedents utilized were the Act of March 2, 1901, establishing the Spanish Treaty Claims Commission (a purely American Tribunal); the Act of September 26, 1914 (38 Stat. 722), conferring certain powers on the Federal Trade Commission; the Act of March 3, 1911 (36 Stat. 1139), dealing with the Court of Claims." Philip C. Jessup, "National Sanctions for International Tribunals," 20 Am. Bar Ass'n Journ. 56 (1934).

Canadian Parliament passed a similar act.²⁵ The two Commissioners, Chief Justice Lyman Poore Duff of the Supreme Court of Canada, and Associate Justice Willis Vandevanter of the United States Supreme Court, presented to the two Governments on December 7, 1934, a joint statement for the guidance of the Agents, declaring that they would accept these two acts "as embodying the procedure to be followed in securing the attendance of witnesses for examination or cross-examination" before them.²⁶ A number of subpoenas, including a subpoena *Duces Tecum*, and a writ of Habeas Corpus were issued by Justice Vandevanter under authority of this act.²⁷ The Justice went so far as to hold that either Commissioner might subpoena persons residing in Canada, and to issue two subpoenas to persons residing in Montreal, directing that they be sent to the American Consul General there to be served by him, which was accordingly done.²⁸

When the American Agent sought to invoke the procedure provided by the Act of July 3, 1930, to obtain the attendance of witnesses before the United States-German Mixed Claims Commission, it was held, upon the objection of the German Agent, that as this legislation increased the powers of the Commission beyond those agreed upon by the treaty creating the Commission the power so conferred could not properly be invoked.²⁹ An amend-

²⁵ Statutes of Canada, 1934, 24-25 George V, Ch. 37, p. 455.

²⁶ Ms. Dept. of State, file no. 811.114 *I'm Alone*/4125. The statement added, however, that this was not "intended to exclude or to throw any doubt upon the propriety or desirability of voluntary attendance of declarants or affiants, whose affidavits are being used by one of the Governments, for cross-examination by the other, pursuant to any arrangement between the two Governments or their Agents."

In the course of a statement with regard to ultimate beneficial ownership, submitted at the request of the Commissioners, the Canadian Agent said: "In order to facilitate the expeditious disposition of the case, the contentions are being presented in the present statement, and the evidence is in the Appendices hereto annexed, in the form of affidavits, declarations and other documents. It is understood that the Agent of the United States may request the attendance at the hearing of affiants or declarants, and formal proof of documents, and that such request will be complied with in so far as it may be practicable to do so. It is also assumed that the statement by the Agent of the United States will be subject to a corresponding understanding." *Joint Interim Report of the Commissioners*, Dept. of State, Arbitration Series No. 2(6), p. 10.

²⁷ Ms. Dept. of State, 811.114 *I'm Alone* / 4229, 4264, 4305.

²⁸ *Ibid.*, enclosures 4229 and 4247.

²⁹ Sen. Rept. No. 88, 73d Cong., 1st Sess. Of the new bill, the Report said:

"This bill is not open to the same objection, in that it does not increase the power of any existing international tribunal or commission. It does make available to the American agent thereof the right to apply to a Federal district court for the necessary process to enforce the giving of otherwise reluctant testimony and the production of otherwise unavailable documentary evidence necessary to a full and fair disclosure of the facts surrounding claims pending before such tribunal or commission, whether now or here-

atory act was accordingly passed by Congress, and approved June 7, 1933, adding four new sections to the previous act. Section 5 provided:

"That the agent of the United States before any international tribunal or commission, whether previously or hereafter established, in which the United States participates as a party whenever he desires to obtain testimony or the production of books and papers by witnesses may apply to the United States district court for the district in which such witness or witnesses reside or may be found, for the issuance of subpoenas to require their attendance and testimony before the United States district court for that district and the production therein of books and papers, relating to any matter or claim in which the United States on its own behalf or on behalf of any of its nationals is concerned as a party claimant or respondent before such international tribunal or commission."

Section 6 conferred upon district courts the power necessary to the issuance of the subpoenas and prescribed the procedure for the taking of the testimony.³⁰ The power of the courts to enforce

after established. It affords an immediate as well as a future remedy, and places American agents on a parity with foreign agents in this respect."

Chandler P. Anderson, American member of the Commission, said in discussing the objections made by the German Agent:

"It is clear, however, that notwithstanding these objections on the part of the German Government to proceedings under the act of general application above mentioned, the Government of the United States would be entirely within its rights in adopting legislation for action by the American Commissioner or Agent, independent of formal action by the Commission, through the American courts, similar to that authorized by the German ordinance above mentioned, and, in view of this German legislation, Germany could make no objection to the subpoenaing of witnesses and documents under such legislation in the United States.

"The result of the above noted limitation upon the authority of this commission and the American Agent, has been that, in many cases, evidence of decisive importance in the prosecution of American claims could not be obtained by the American Agent at all, and, in other instances, unwilling or mercenary witnesses have had to be paid by the claimants for their testimony or for the production of documents in their possession, and sometimes, especially in cases involving large claims, indispensable witnesses have attempted to induce the opposing sides to bid against each other for their support. In one instance, at least, the same affiant has sold contradictory evidence to each side in turn, and the commission has been powerless to have the witness guilty of such reprehensible conduct punished either for contempt of court or for perjury. If the commission or the American Agent had been able, by subpoena, to require witnesses to appear and testify under oath and to produce documents, subject to punishment for perjury or contempt, such witnesses could have been compelled not only to tell the truth, but to tell it without being paid for it." "Production of Evidence by Subpoena before International Tribunals," 27 A.J.I.L. 501 (1933).

³⁰ 48 Stat. 117. Section 7 provided penalties, and section 8 declared the Supreme Court of the District of Columbia a district court for the purposes of the act.

A German ordinance of June 28, 1923, had conferred similar powers upon the German courts for compelling witnesses to testify, with respect to cases before the Mixed Claims Commission. *Reichsgesetzblatt*, 1923, Pt. II, p. 299; *Report of American Commissioner*, Dec. 30, 1933 (Washington, 1934) 9.

the taking of testimony under the Act was at once challenged in three courts, but the power of the court was sustained in every instance.³¹

This legislation has filled a much felt need in the obtaining of testimonial evidence for the proper prosecution of cases before tribunals to which the United States is a party. It would be desirable to include in the arbitral agreement provision for the reciprocal enforcement of such rules relating to the attendance of witnesses in any case in which the use of oral evidence is contemplated.³²

³¹ "The opinion in the Northern District of Ohio is dated July 17, 1933, in the case entitled *In re: United States of America, on behalf of Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Ltd., et al. v. the Government of Germany* now pending before the Mixed Claims Commission, United States and Germany, Docket Nos. 8103, 8117, et al.; the opinion in the district of Maryland is dated August 3, 1933, in the case entitled *In the Matter of Petition of Robert W. Bonyngue, American Agent*, for subpoena of certain witnesses, under Act of Congress of June 7, 1933; the opinion in the Eastern District of New York is dated August 7, 1933, in the case entitled *In re: United States of America, on behalf of the Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Ltd., et al. v. the Government of Germany* now pending before the Mixed Claims Commission, United States and Germany, Docket Nos. 8103, 8117, et al.' This last opinion will be found in 5 Fed. Supp. p. 97." Bonyngue's Report (1934) 212.

See also *U. S. on behalf of Lehigh Valley Ry. Co. et al. v. Government of Germany*, 5 F. Supp. 97, 1933 (D.C., Eastern Dist., N.Y.) The Court ruled that the witnesses were not parties to the claim and had no right to raise a question as to the taking of evidence, saying:

"The witness will have a right to refuse to answer questions on any grounds on which a witness may refuse on a trial or hearing or taking of a deposition, and it will not be until such refusal and on a proceeding to punish for contempt that the matter will become personal to the witnesses, and the decision thereon final and appealable." *Ibid.* 100.

³² "The salient defect of the conventions in this respect is the failure to make any provision for compelling the attendance of witnesses, . . . It would be a simple matter for the parties to future conventions of this character to permit the service of compulsory process of witnesses in their respective territories. Witnesses so served might either be compelled to appear before the tribunal or to give testimony before a local court. Such provisions should be supplemented by national legislation, but the problem cannot be solved by national legislation alone. The provisions in the rules of some of the Mexican Claims Commissions for the issuing of letters rogatory were not binding on the contracting states since they are not stipulated in the Conventions, and such letters could not have the force of compelling testimony." Feller, *Mexican Commissions*, p. 256.

"It is suggested that the Act of June 7, 1933, might properly be still further amended to allow the agent of the other government, party to the arbitration, on his own initiative to make like use of our courts for the securing of evidence. If the Department of State could, by informal suggestion through the diplomatic channel, secure the passage of reciprocal legislation in other countries, the cause of international arbitration would be well served. It might also be well to insert in future treaties or agreements creating international arbitral tribunals a provision which would assure to the tribunal the power to make use of our statute." Jessup, *op. cit.*, 20 Am. Bar Ass'n Journ. 57 (1934).

But see opinion of Commissioner Nielsen in the *Russell* case, before the United States-Mexican Special Claims Commission, expressing a doubt whether one nation has the power to confer upon a commissioner of an

The Permanent Court of International Justice has not been given power to compel the attendance of witnesses. For the service of all notices upon persons other than agents, counsel and advocates, it must apply direct to the government of the state upon whose territory the notice is to be served. Similar application must be made when it is desired to take evidence on the spot.³³ This provision was derived from an almost identical one in Article 76 of the Hague Convention of 1907.³⁴ Although this deficiency in the power of the Court has not heretofore been the occasion of any difficulty, this is probably because resort to oral testimony has

international tribunal the authority to issue subpoenas. *Opinions of Commissioners, 1926-1931*, p. 90.

With reference to the experience of the United States-French Mixed Claims Commission of 1880 in obtaining the testimony of witnesses, Moore says:

"By the rules of the commission provision was made for the taking of testimony in the United States and in France. At the suggestion of several parties who were appointed commissioners to take testimony in Paris, Mr. Morton, the minister of the United States at that capital, inquired of the French foreign office whether there was any means of compelling the attendance of witnesses, many of whom had refused voluntarily to appear, and whether it was the intention of the French government to be represented by counsel at such examinations. The foreign office replied that there was no law in France by which witnesses could be compelled to answer a summons unless it proceeded from a competent judicial authority. As to being represented at the examination of any witnesses who might voluntarily appear, the foreign office answered that the initiative in the matter was intrusted to the agent of France before the mixed Commission." II Moore's *Arbitrations* 1140 (citing H. Ex. Doc. 235, 48th Cong., 2d Sess.)

³³ Statute, Art. 44. Art. 54 of the Rules provides: "The Court may invite the parties to call witnesses or experts . . . If need be the Court shall apply the provisions of Article 44 of the Statute of the Court." The last sentence was added to this rule in 1936, the rule having been contained in Art. 48 in the 1931 Rules. Cf. Arts. XIX and XX of the Convention for the Establishment of a Central American Court of Justice. 2 A.J.I.L., Supp. 231, 239 (1908).

During the revision of the Rules in 1936, M. Anzilotti said with reference to this article:

"M. Anzilotti recalled that in 1922 a different standpoint had been taken; it had been held that, before such a Court [as the Permanent Court], reliance must above all be placed in the willingness and ability of the parties to furnish the Court with the necessary evidence. . . . The general rule was that the Court approached the parties; and only if a party were unable to produce a witness or obtain some other evidence was the procedure mentioned in Article 44 of the Statute to be resorted to."

He pointed out further that "the rule was that a party must undertake to produce its own witnesses as well as those whom the Court wished to hear." Jonkheer Van Eysinga recalled "that in 1922 the Court had decided to retain the principle expressed in Article 48, namely, that the Court could on its own initiative apply to a Government to secure the appearance of a particular witness." Series D, No. 2 (3d add.), pp. 240-241.

³⁴ This article contains an additional provision not included in the Statute of the Permanent Court:

"The requests for this purpose are to be executed as far as the means at the disposal of the Power applied to under its municipal law allow. They can not be rejected unless the Power in question considers them calculated to impair its own sovereign rights or its safety.

"The Court will equally be always entitled to act through the Power on whose territory it sits."

been had in only one or two instances. This lack of power might very well put the Court in an embarrassing position, for, in addition to the fact that it makes the compulsory attendance of witnesses dependent upon the good faith of the states concerned, it is to be noted that few states seem to have legislation which would enable them to produce witnesses to testify before the Court.³⁵

Section 70. Punishment for Perjury. With the exception of the cases in which tribunals have been given power to compel witnesses to appear and testify or to produce documents, or in which other provision has been made for such compulsory attendance and production, there is no authority to impose penalties for perjury, either in the tribunals or in the courts of the states parties to the proceedings. Nevertheless, it is generally required, especially in claims commissions, that witnesses shall testify under oath or affirmation, and that if evidence is taken out of court it shall be under oath.³⁶

³⁵ Hudson, *Permanent Court*, p. 503.

³⁶ *Hudson's Bay and Puget's Sound Agricultural Companies* cases (United States v. Gt. Britain), July 1, 1863, Rules, I Moore's *Arbitrations* 241; *The Halifax Commission* (United States v. Gt. Britain), May 8, 1871, Rules, *ibid.* 729; United States-French Mixed Claims Commission, Jan. 15, 1880, Rules, III Moore's *Arbitrations* 2216; Claims of *Pelletier and Lazare* (United States v. Haiti), May 24, 1884, II Moore's *Arbitrations* 1753; French-Chilean Mixed Claims Commission, Oct. 19, 1894, Rules, Oct. 17, 1895, Art. XI, *Convención de arbitraje entre Francia I Chile y reglamento de procedimientos*, p. 6; United States-Mexican General Claims Commission, Sept. 8, 1923, Convention, Art. III, Treaty Series No. 678; British-Mexican Claims Commission, Nov. 19, 1926, Convention, Art. IV, *Decisions and Opinions*, p. 6; Special Mexican Claims Commission, Act of April 10, 1935, Rules, Art. IV, *Rules and Regulations* (Washington, 1935) 3.

The rules of some of the Mixed Arbitral Tribunals provided that witnesses should not be required to take an oath unless otherwise directed by the Tribunal. See, for example, Art. 31(b) of the Anglo-German Rules, 1 *Recueil des décisions* 116. Others required an oath, however. See German-Belgian Rules, Art. 51, *ibid.* 40.

In the *Harrah* case (United States v. Cuba) Oct. 1, 1929, the arbitrators being in disagreement on the question of requiring an oath of witnesses, compromised by having the following statement read to each witness: "It has been resolved by this Tribunal that no oath be required from the witnesses as it is customary to be done by the courts of Justice by reason of this Tribunal being an International Court, although it has been entrusted with an investigation that has a great deal of a judicial nature, to say the least, great resemblances. In spite of it all, it has not been our desire that the witness should present himself constrained by what might be interpreted, although erroneously as a threat of prosecuting him for the crime of perjury, should he fail to tell the truth. Instead of that he comes here freely with no fear of punishment, but trusting Mr. Howe and I that he is going to render us a loyal service. Both parties, the Government of the United States of America and the Cuban Government, have no other interest but illustrating the facts in order to find the truth. It is a service rendered by the witness to both Governments, by stating the truth and we appeal to his honor and to his conscience to tell the truth." *Record of the Proceedings* (1929-1930), vol. 2, pp. 702-707.

Colin and Capitant assert that the religious character of the oath is indelible and has an absolutely different effect from a promise or affirmation. *Op. cit.*, vol. II, p. 462.

It may be noted that under Art. 391 of the present Code of Civil Pro-

Witnesses are required by Article 53 of the Rules of the Permanent Court of International Justice to make the following solemn declaration: "I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth." The Court seems to have been influenced in its decision not to require an oath by its lack of power to impose a penalty for perjury.³⁷

Provision for punishment for perjury has been included in the cases discussed in the previous section in which conventional or statutory authority has been conferred upon the tribunal, or the municipal courts of a party to the arbitration to compel the attendance of witnesses.³⁸ Certain domestic claims commissions have also been given power to impose punishment for perjury.³⁹ The

cedure in Germany the witness testifies under oath only "if the court considers this advisable in view of the importance of the testimony, or in order to obtain a truthful testimony, and if the parties do not waive the oath."

³⁷ Series D, No. 2, pp. 82-83. The language in which the declaration may be made is not prescribed, but it may be made in a language other than French or English. Series C, No. 11-I, pp. 27-28.

Each expert is required by Art. 53 of the Rules to make a solemn declaration that his statement will be in accordance with his "sincere belief." See also Report of the Registrar, June, 1933, Series D, No. 2 (3d add.), p. 826.

³⁸ ". . . every person knowingly and willfully swearing or affirming falsely in any such proceedings before an international tribunal or commission to which the United States is a party, whether held within or outside the United States, its territories or possessions, shall be deemed guilty of perjury and shall, upon conviction, suffer the punishment provided by the laws of the United States for that offense, when committed in its courts of justice." Act of July 3, 1930, Sec. 1, 46 Stat. 1005.

"Sec. 7. That every person knowingly or willfully swearing or affirming falsely in any testimony taken in response to such subpoenas shall be deemed guilty of perjury, and shall, upon conviction thereof, suffer the penalty provided by the laws of the United States for that offense when committed in its courts of justice. Any failure to attend and testify as a witness or to produce any book or paper which is in the possession or control of such witness, pursuant to such subpoena, may be regarded as a contempt of the court and shall be punishable as a contempt by the United States district court in the same manner as is provided by the laws of the United States for that offense in any other proceedings in its courts of justice." Act of June 7, 1933, Sec. 7, 48 Stat. 118.

For the American and Canadian Acts implementing Art. XII of the Treaty of Jan. 11, 1909, establishing the International Joint Commission empowering the circuit and superior courts respectively to issue all necessary processes to compel witnesses to attend and testify see Act of March 4, 1911, 36 Stat. 1364, and Act of May 19, 1911, Stat. of Canada, 1911, 1-2 George V, 244. Punishment for perjury was specifically provided in the Canadian Statute enacted in pursuance of Art. III of the Behring Sea Claims Convention of Feb. 8, 1896: Canada, Act of April 23, 1896, 59 Victoria, Ch. 2, Sec. 3, p. 18. It seems implicit in the United States Act of May 7, 1896, enacted for the same purpose. 29 Stat. 115. See *supra*, p. 210.

The power to punish for perjury is implicit in the provision in Article VII of the Boundary Convention of March 1, 1889, between the United States and Mexico, quoted, *supra*, pp. 209-210.

³⁹ For example, see Rules of the United States Court of Claims, Sec. 63, *Opinions in French Spoliation Cases* (1912) 17; Court of Commissioners of Alabama Claims, Act of June 23, 1874, Sec. 3, *Report from the Secretary of State with Accompanying papers relating to the United States Court of*

general lack of authority to impose punishment for perjury before international tribunals is greatly to be regretted. If discovered, perjured evidence can and will be thrown out, and an award denied, if the evidence is vital. But a penalty for perjury is valuable chiefly for its preventive rather than its actual penal effect. Tribunals have not infrequently complained of the fraudulent character of evidence submitted to them, and of their inability to punish the offenders.⁴⁰ The best solution would seem to be through the general adoption of municipal legislation along the lines of that described in the previous section. It would have the advantage of permanence, and could readily be included by reference, if necessary, in any arbitral agreement concluded. Such legislation could also be made applicable to perjury committed before the Permanent Court of International Justice, the penalty to be applied by municipal courts, since any other procedure for its application would not be feasible. In all cases such legislation should be made broad enough to cover false swearing in documentary evidence.

Section 71. Payment of Witnesses. In accordance with the rule generally applied in municipal law, it is the usual practice for the expenses and fees, if any, of witnesses to be paid by the party at whose instance they are called. It is only when witnesses are called by the tribunal, or produced at its request, that such expenses and fees may be charged to the general expenses of the proceedings to be shared by the parties.⁴¹ The same rule obtains in the Permanent Court of International Justice.⁴²

Commissioners of Alabama Claims (Washington, 1877) 133; Spanish Treaty Claims Commission, Act of March 2, 1901, Sec. 7, 31 Stat. 877. Executive Order No. 65, July 9, 1917, of the Military Governor defining the powers of the Dominican Claims Commission conferred upon the Commission in matters relating to the testimony of witnesses powers equivalent to those possessed by the Dominican Courts. It provided that any person "who gave false testimony under oath before the Commission should be guilty of perjury" and empowered the Commission to impose fines of \$50 to \$5000 and imprisonment of from one month to five years. *Informe final de la Comisión dominicana de reclamaciones de 1917* (Santa Domingo, 1920) 63-65.

⁴⁰ See *infra*, sec. 103.

⁴¹ Greenleaf, *op. cit.*, vol. I, pp. 469-470; IV Wigmore's *Evidence*, sec. 2201.

In the *I'm Alone* case, witnesses subpoenaed from Canada were paid travelling expenses and fees of \$40.00 by the United States. Ms. Dept. of State, 811.114 *I'm Alone*/4247.

"Sec. 3 . . .

"(c) . . . Any witness appearing for the United States before the Arbitrator or any such referee at any place within or without the United States may be paid the same fees and mileage as witnesses in courts of the United States. Such payments shall be made out of any funds in the German special deposit account hereinafter provided for, and may be made in advance." "Settlement of War Claims Act of 1928," 45 Stat. 254, 257. See also United States Court of Claims, Rules, Art. 38. *Opinions in French Spoliation Cases* (1912) 13.

See Art. 24 (b) of the Rules of the Anglo-German Mixed Arbitral Tribunal, 1 *Recueil des décisions* 115.

⁴² If witnesses or experts appear at the instance of the Court, their indemnities are paid out of its funds. Rules, Art. 55; Series E, No. 3, p. 211.

Section 72. Procedure in Examination. In the matter of its use of the oral testimony of witnesses, the practice of international tribunals represents a combination of features derived from Anglo-American law and from the civil law, with the latter, perhaps, predominating. While the testimony of witnesses is frequently resorted to as a means of proof in international proceedings, such testimony is seldom taken directly before the tribunal, being reduced to writing through examination elsewhere and then produced before it.⁴³ This resembles civil law procedure in which the examination of witnesses is conducted typically in a hearing (*enquête*) before a judge specially designated by the Court for that purpose.⁴⁴ Under French law, the judgment ordering the *enquête* sets out the facts to be proved, and names the judge to conduct it. The parties and their counsel may, but need not be present at the *enquête*. After being sworn, the witness may make his voluntary statement *without interruption*, but is usually guided by the judge through questions. The judge asks whatever questions he sees fit, and the parties or their representatives may put questions through the judge, but may not question the witness directly. The deposition is then read to the witness who may make any additions or alterations he wishes, which are written in by the clerk, and signed by the witness, the clerk and the judge. The deposition is then forwarded to the Court as a part of the record, the witness never appearing in person before it. The witnesses testify separately.⁴⁵ Italian procedure is substantially the same,

⁴³ Even in claims commissions, the taking of evidence directly before the commission is an exceptional procedure. Feller cites but six cases in which the appearance of witnesses before the Mexican Claims Commissions was recorded. *Mexican Commissions*, p. 253. See Ralston, *Law and Procedure* (1926) 204-205.

Ralston says that in several instances before the United States-German Mixed Claims Commission witnesses were examined orally by the umpire, counsel being present. *Law and Procedure*, Supplement (1936) 99. See also *Fabiani* case (Italy v. Venezuela), Feb. 24, 1891, *Affaire Fabiani Exposé sommaire des faits* (Après les mémoires des parties). (Berne, 1895) 2-5.

A tribunal may be limited to the reception of written evidence. See Ralston, *Law and Procedure* (1926) 205; United States-Peruvian Mixed Claims Commission, Dec. 4, 1868, ms. *Proceedings and Awards* (1868) 41.

⁴⁴ Taking of evidence on deposition is exceptional in Anglo-American law except in Equity or Chancery proceedings. One of its characteristic features is the examination and cross examination of witnesses in open court. Greenleaf, *op. cit.*, vol. I, pp. 478-484. Cf. *supra*, sec. 42.

⁴⁵ Code of Civil Procedure, Arts. 252-262, 268-277, *Code de procédure civile*, annoté, etc., trente-troisième édition, par. M. Henry Bourdeaux, Paris, 1936; Garsonnet and Cézard Bru, *op. cit.* 316-333; Bonnier, *op. cit.* 247-248, 338-341; O. S. Tyndale, "Organization and Administration of Justice in France," XIII Canadian Bar Rev. 657-658 (1935). See *supra*, sec. 52, for a description of the procedure of taking depositions in Mexican law.

The formalities required by the Code of Civil Procedure are disregarded on penalty of nullity of the evidence taken. Garsonnet and Cézard Bru, *op. cit.* 326-333.

The procedure for the examination of witnesses in German courts is substantially similar to the French procedure. See Arts. 394-398 of the Code of Civil Procedure (1933). Under Art. 397 the Court must, upon request,

except that the Tribunals have discretionary power to order that the examination take place in open court.⁴⁶

As previously stated in section 27, in international procedure the testimony of witnesses is always taken after due notice to the opposing parties of the witnesses to be examined and the subjects to be covered by the testimony. The taking of the testimony is subject to the direction and control of the tribunal, and the examination, generally speaking, is controlled by rules prescribed by it, especially if the witnesses are examined before the tribunal itself. As already indicated, however, the testimony is more frequently taken outside the tribunal by a commissioner designated for the purpose by the tribunal, or before some local officer authorized to take such testimony, and in the latter case, if not otherwise specified, the examination is conducted in accordance with the requirements of the local law.⁴⁷

As a rule the examination of witnesses is not conducted according to any strictly formal system of procedure, whether before the tribunal or before some agency designated for the purpose. In the latter case, however, the taking of depositions or the execution of letters rogatory must conform substantially to the requirements of the local law. The actual questioning of the witness is usually carried out directly by the agents or counsel subject to the control of the tribunal, and the right of cross-examination is specifically assured in nearly every instance. This right extends to cases in which testimony is taken by deposition

allow counsel to question the witnesses directly. Generally the record of the witness' testimony is dictated by the judge and then approved by the witness.

In Germany while witnesses are usually examined before one member of the court, they are now more than formerly examined before the entire court. See von Lewinski, *op. cit.* 5 Ill. L.R. 198, 199-210 (1910-1911). For a discussion of the modification of the requirement that all witnesses appear and testify orally, see Robert Wyness Millar, in Engelmann, *op. cit.* 621-622. See also Arts. 355 and 375 of the Code of Civil Procedure (1933).

⁴⁶ Lessona, *op. cit.*, vol. 1, pp. 228-231, vol. 4, pp. 6-10, 270-273, 320-332, 392, 403; Engelmann, *op. cit.* 57.

Following this device of civil law procedure, the Mixed Arbitral Tribunals provided in their rules in a number of instances for an *enquête* in the event that the parties were found not to be in accord on the pertinent facts. See, for example, Rules of the Franco-German Tribunal, Art. 51, 1 *Recueil des décisions* 51; Greek-Bulgarian Tribunal, Art. 51, *ibid.* 261. For cases involving resort to an *enquête*, see *Grigoriou v. État bulgare* (Greek-Bulgarian Tribunal) 3 *Recueil des décisions* 977, 980 (1924); *Schulheimer v. Franck* (German-Belgian Tribunal) 6 *Recueil des décisions* 776 (1927).

⁴⁷ French-Chilean Claims Commission, Oct. 19, 1894, Rules, Arts. XI-XII, *Convención de arbitraje entre Francia I Chile y reglamento de procedimientos* (Santiago, 1895) 6; United States Court of Claims, Rules, Arts. 34-36, *Opinions in French Spoliation Cases* (1912) 13; British-Mexican Claims Commission, Nov. 19, 1926, Rules, Arts. 29-30, 32, *Decisions and Opinions*, p. 14; French-Mexican Claims Commission, Sept. 25, 1924, Rules, Arts. 31-33, 35, *Règlement de Procédure* (1925) 14-16; German-Mexican Claims Commission, March 16, 1925, Rules, Arts. 31-33, 35, *Convención de reclamaciones*, etc. (1925) 15; Italian-Mexican Claims Commission, Jan. 13, 1927, Arts. 30-31, *Reglas de procedimiento* (1931) 14; Spanish-Mexican Claims Commission, Nov. 25, 1925, Rules, Arts. 33-38, *Reglas de procedimiento* (1927) 10-12.

or on interrogatories before an agency designated by the tribunal. In the latter case the questioning is done in the first instance by the official in charge, with the right reserved to the representatives of the parties to be present and to cross-examine.⁴⁸ Cross-examination under such circumstances is quite different in character and effect from the typical cross-examination in an Anglo-American court conducted in the presence of the judge or judges. In some instances the right of examination is limited to one counsel of each party.⁴⁹

The procedure of examination of witnesses adopted by the Permanent Court of International Justice also represents a combination of Anglo-American and civil law procedure. Article 51 of the Statute gives the Court discretion to prescribe in its rules the conditions under which questions are to be put to witnesses

⁴⁸ *Hudson's Bay and Puget Sound Agricultural Companies* cases (United States v. Gt. Britain), July 1, 1863, Rules, Art. IV, *Rules and Regulations of the Commissioners* (Washington, 1865) 1; United States-Spanish Mixed Claims Commission, Feb. 12, 1871, Regulations adopted May 31 and June 14, 1873, Separately printed for the Commission, National Archives of United States, p. 7; *The Halifax Commission* (United States v. Gt. Britain), May 8, 1871, I Moore's *Arbitrations* 722; United States-Venezuelan Mixed Claims Commission, Dec. 5, 1885, Rules, Arts. XII-XIII, *Opinions in Principal Cases* (1890) 6-7; United States-Chilean Mixed Claims Commission, Aug. 7, 1892, Rules, Art. XIII, *Minutes of Proceedings* (1894) 24; United States-Panamanian Joint Claims Commission, Nov. 18, 1903, Rules, Art. XVI, *Final Report of Commission* (1920), Appendix A, p. 22; *Chamizal* case (United States v. Mexico), June 24, 1910, Rules, Art. IV, *Case of the United States* (Washington, 1911), Appendix, p. 4; United States-German Mixed Claims Commission, Aug. 10, 1922, Rules, Art. V (c), Bonyng's Report (1934) 261; Tripartite Claims Commission (United States v. Austria, and Hungary), Nov. 26, 1924, Rules, Art. VIII (b), Parker's Report (1930) 51; Anglo-German Mixed Arbitral Tribunal, Rules, Art. 31, 1 *Recueil des décisions* 116. For analogous rules of the other Tribunals, see *Recueil des décisions*, vol. 1, *passim*.

See also *Ruden and Co.* case (United States v. Peru), Dec. 4, 1868, ms. *Proceedings and Awards* (1868), Opinion of Commissioner Vidal, pp. 289, 303; *Ezequiel Vela* case (Brazil v. Peru), *Introdução e actas* (1916), vol. 1, p. 175. In the latter case the Brazilian Commissioner objected to the validity of certain evidence because taken without examination, saying:

"The value of testimonial proof, the most fragile and suspicious of all evidence, demands as a requisite absolute for its acceptance that the witnesses be free from animus sufficiently to decide the truth and know the facts upon which the litigation turns . . . It follows that such requisites confer upon him against whom the evidence is produced the right of objecting to the testimony and calling attention to its incapacity and its defects; it follows from this that . . . the opposing party should be notified, to enable him to take part in interrogations.

"For assuring the necessary sincerity of the truth and satisfying the moral necessity of attaining certainty, indispensable to correct judgment, in some cases more has been demanded, as in the Tribunals Itala-Chilean; Franco-Chilean, meeting in Santiago de Chile (1885-1886). There was designated in each case the authority before whom declarations should be taken, which aimed also to prevent investigations before authorities lacking precise impartiality." Translation.

⁴⁹ *The Halifax Commission* (United States v. Gt. Britain), May 8, 1871, I Moore's *Arbitrations* 729.

and experts during a hearing.⁵⁰ Acting upon this authority, the Court has provided in the first paragraph of Article 53 of its Rules:

"Witnesses and experts shall be examined by the agents, counsel or advocates of the parties under the control of the President. Questions may be put to them by the President and by the judges."

It will be observed that this rule departs from civil law procedure by permitting witnesses to be examined directly by the representatives of the parties.⁵¹

"The Court, or the President should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps for the examination of witnesses or experts otherwise than before the Court itself." (Article 56, 1936 Rules). During the preparation of the 1936 Rules the corresponding Article (49) of the 1931 Rules was criticized by the Registrar as "illogical" and poorly drafted, and doubts were expressed as to the power of the Court to delegate authority to take the testimony of witnesses. It was retained only by an evenly divided vote, the President casting his vote for retention, saying that "as a principle when the Court was considering amendments to be made in the Rules, no amendment should be made without a majority."⁵²

⁵⁰ For a brief account of the discussion of this Article at the time of the adoption of the Statute, see Hudson, *Permanent Court*, p. 173. The original draft proposed by the Committee of Jurists contained a second sentence reading: "The agents, advocates and counsel shall have the right to ask, through the President, any questions that the Court considers useful." Hudson says that in the subcommittee of the Third Committee of the Assembly of the League, Sir Cecil Hurst proposed the deletion of this sentence, saying it was "based on the Continental system of procedure," and that "the British Government, in accordance with the Anglo-American system would prefer to give more liberty to the judges."

⁵¹ "Lord Finlay said that in this connection he could not agree to the text of Article 40 of the committee's conclusions. In his opinion, witnesses should be examined by those who had summoned them, that is to say, in the great majority of cases, by the parties. The President and other members of the Court should only retain the right to put further questions in order to elucidate special points."

"The President and M. Weiss having pronounced themselves in the same sense as Lord Finlay, the Court agreed that the examination should in the first place be conducted by the parties, and that the President and other members of the Court should only put supplementary questions to the witnesses." Series D, No. 2, p. 83. See also p. 303.

⁵² Series D, No. 2 (3d add.), pp. 825, 225-226. The following discussion took place:

"Personally, he regarded the examination of witnesses as in the nature of an enquiry which could be entrusted to members of the Court under Article 50 of the Statute.

"M. Fromageot, even if such an assimilation were justified—on which

The Court has had no experience upon which an evaluation of these rules can be based. The latter rule has not been resorted to in any case.⁵³ On only one occasion have witnesses been heard by the Court,⁵⁴ which was in the case concerning *German Interests in Polish Upper Silesia*. In that instance, the witnesses were examined and cross-examined by the agents and certain questions put to them by the President and the other judges.⁵⁵ In its report of November 23, 1935, the Second Committee (on revision of the Rules) said that in future "where the evidence of witnesses was important," it was not likely that "the Court consisting . . . now of fifteen judges would attempt to hear the witnesses itself," but that "it would delegate a judge, or nominate a commission, to take the testimony."⁵⁶

Section 73. Taking of Depositions.⁵⁷ Most of the evidence given by individuals in international judicial proceedings, as contrasted with documentary evidence consisting of public and private records, comes before the tribunals in the form either of affidavits or depositions. The problems arising with reference to the use of the former have already been discussed.⁵⁸

As indicated in the preceding section, depositions constitute by far the greater part of the oral testimony of witnesses utilized by international tribunals. This is true as much of Anglo-American arbitrations as of any other. The reasons for the practice in international proceedings are purely pragmatic, the most important one, perhaps, being that international tribunals do not in most cases have time to hear witnesses. Frequently the witnesses are

point he was doubtful—thought that the examination of witnesses was perhaps a more delicate matter than an enquiry.

"The President did not dispute that, but thought that the Court derived its right either from Article 50 or from Article 30 of the statute.

"M. Guerrero, Vice President, took the same view. If the Court could, under Article 50 of the statute, appoint a commission composed of persons unconnected with it, why should it not appoint some of its own members?

"M. Urrutia thought that provision should not be made for witnesses to be examined out of Court by members of the Court. Recourse would always have to be had to the State in whose territory the witnesses happened to be in order that they might be examined in accordance with the laws of that State. Accordingly, he saw no great advantage in providing that witnesses might be examined by judges empowered to do so. It would be better to stick to the terms of Article 51, which provided that witnesses would be examined by the agents or counsel of parties or interested governments under the control of the President, the latter, and after him the judges, being able to put questions to them."

⁵³ Report of the Registrar, June, 1933, *ibid.* 825.

⁵⁴ *Ibid.* 770.

⁵⁵ Series C, No. 11-I, pp. 29-33. For an account of the procedure in this case, see Hudson, *Permanent Court*, pp. 504-505.

⁵⁶ Series D, No. 2 (3d add.), p. 770.

⁵⁷ See *supra*, sec. 52, for description of the procedure of taking depositions under Mexican law.

⁵⁸ See *supra*, sec. 57.

numerous and scattered, living long distances from the seat of the tribunal, so that bringing them before it would be excessively expensive even if the tribunal had authority to compel them to attend.

The procedure for the taking of depositions follows about the same pattern in most cases. Due notice must be given to the opposing parties, naming the witnesses to be examined and giving their addresses, and specifying, if possible, the subjects to be covered by the examination.⁵⁹ The depositions may be taken by a subcommission, or a judge delegated for the purpose, but more frequently they are taken before local officials duly qualified to take depositions for use in the local courts. Generally they are taken on the basis of interrogatories and cross-interrogatories filed with the tribunal, but the examination and cross-examination in some cases is conducted orally by the representatives of the parties.⁶⁰ The opposing party may be given its choice of filing written interrogatories or of appearing and cross-examining the witness. In nearly all cases the right of both parties to be present at the examination is assured. If examination is by written interrogatories, the questions are put by the examining official and the answers recorded as precisely as possible. The representatives of the parties are permitted to attend and conduct the examination. They may be permitted to make objections to questions asked, the objections to be duly noted, and submitted to the tribunal with the depositions. All depositions are made under oath or affirmation, signed by the witness after having been read to him for any corrections, and signed and sealed by the examining official. Usually if he is a local official, it is required that his signature and seal be duly certified by a competent official.⁶¹

⁵⁹ Cf. *supra*, sec. 27.

⁶⁰ The latter was done in the *Hudson's Bay* and *Puget Sound Agricultural Companies* cases (United States v. Gt. Britain), July 1, 1863, I Moore's *Arbitrations* 241. Art. IV of the Convention of July 1, 1863, further says: "Evidence may also be taken by the Commission on the motion of either party under such regulations as shall from time to time be prescribed by the Commissioners. . . ." Ms. *Proceedings and Awards* (1863) 11. Under the rules of the United States Court of Claims, depositions obtained in foreign countries must be on written interrogatories, but those in this country may be on oral examination. Arts. 39-52, *Opinions in French Spoliation Cases* (1912) 13-16.

⁶¹ *Islands in the Bay of Fundy* case (United States v. Gt. Britain), Dec. 24, 1814, ms. *Journal of Proceedings* (1814), vol. I, pp. 27-28; United States-Colombian Mixed Claims Commission, Feb. 10, 1864, Rules and Regulations, Aug. 24, 1865, Arts. 2, 3, 4, printed circular, National Archives of United States; United States-British Mixed Claims Commission, May 8, 1871, Rules, Arts. 6, 7, Hale's Report (1874) 178-179; United States-Chilean Mixed Claims Commission, May 24, 1897, Rules, Arts. VI-VIII, Perry's Report (1901) 31-32; Spanish Treaty Claims Commission, Act of March 2, 1901, Rules, No. 13, *Documents and Opinions to June 13, 1903*, p. 18; International Joint Commission, United States and Canada, Jan. 11, 1909, Rules, Art. 19, *Rules of Procedure of International Joint Commission* (Washington, 1912).

In some cases depositions have to be taken in countries other than that in which the Tribunal is sitting. Where the tribunal is international, and the depositions are to be taken in the territory of another party to the proceedings, no particular difficulty, aside from the mechanical one, is likely to arise. In the case of the United States-Spanish Commission of 1871, upon the suggestion of the Commission, the two Governments established a sub-commission to take evidence in Cuba. By a special order of June 14, 1873, the Commission provided that claimants might appear before the subcommission with their counsel to examine witnesses, and that the Government of Spain should have the right to appear and cross-examine.⁶² A more serious problem may arise in the case of a domestic commission established to adjudicate claims against a foreign government. After the establishment of the Spanish Treaty Claims Commission by Act of Congress of March

See also Anglo-Chilean Mixed Arbitral Tribunal, Sept. 26, 1893, *Informe del Agente de Chile* (Santiago de Chile, 1896) 16.

In some cases, as in that of the United States Court of Commissioners on the Alabama Claims, Act of June 23, 1874, detailed regulations have been issued for the taking of depositions by the Commissioners appointed for the purpose, prescribing the exact procedure to be followed, including the form of the depositions and of the covering certification. These rules absolutely forbade the presence of any third person at the examination except a clerk. *Report from the Secretary of State with Accompanying Papers*, Sen. Ex. Doc. No. 21, 44 Cong., 2d Sess. (Washington, 1877) 151-152.

⁶² III Moore's *Arbitrations* 2174-2183.

In some instances the United States-French Claims Commission of 1880 issued orders directing counsel to appoint a party authorized by the law of France to take depositions there, and in the event of disagreement that application be made by letters rogatory to the Minister of Justice to select a suitable person to take the depositions. *Minutes of Proceedings*, pp. 414-415.

A remarkable instance of cooperation in the obtaining of evidence abroad is that described by the Agent of the United States in his report of the United States-German Mixed Claims Commission of 1922: "While the American Agent was engaged in collecting the evidence in support of the various claims, the German Agent was likewise engaged in a voluminous correspondence with his Government and with the German nationals, procuring from various sources information in reference to each claim. Upon receiving such information it was his general custom to make a report of the facts as he ascertained them to the American Agent, who, in case the report showed a dispute as to the facts as claimed by the American national in whose behalf the claim was filed, sent a copy of the report to the American claimant in order that he might furnish such additional evidence, if any, as he might have or could obtain to meet the contentions of the respondent Government. If the dispute could not be settled by correspondence, the claimant, or his attorney, was frequently asked to appear at a conference between the Agents, and in such conferences many of the disputed questions of fact were elucidated, and the Agents were thus enabled in such cases to submit the claims to the Commission upon Agreed Statements of facts." Bonyng's Report (1934) 11.

In some cases necessary evidence from abroad is obtained by the Department of State through American Consular or Diplomatic officers. Thus Sec. 5 of the Act of Jan. 20, 1885, conferring jurisdiction upon the Court of Claims to examine the French Spoliation claims, provided that the Secretary of State should procure "through the American minister at Paris or otherwise, all such evidence and documents relating to the claims above mentioned as can be obtained from abroad. . . ." 23 Stat. 284.

2, 1901, it was found to be necessary to amend that act specifically conferring upon the Commission the "same powers . . . possessed by the circuit and district courts of the United States to take or procure testimony in foreign countries." Acting in pursuance of this authority, the Commission sent a commissioner to Cuba through whom commissions and letters rogatory were issued to the proper authorities in Cuba, for the taking of the testimony of witnesses residing there. Necessary evidence from Spain was obtained by means of letters rogatory issued by the Commission with interrogatories and cross-interrogatories attached, forwarded through the Department of State to the Spanish Minister at Washington, and by him to his Government, for execution and return. It was found necessary to send a special representative of the Commission to Spain to expedite the taking of the depositions in pursuance of the letters rogatory.⁶³

In a number of instances the propriety of having depositions taken before consular officers has been challenged, but no instance has been found in which a tribunal has rejected such depositions.⁶⁴

⁶³ Act of June 30, 1902, 32 Stat. 549; Fuller's Report (1907) 7-8, 26-27; Brown's Final Report (1910) 10-11. For briefs filed by counsel for claimants on the question of taking evidence outside the limits of the United States, see Sen. Doc. No. 94, 57th Cong., 1st Sess. See *supra*, p. 16.

⁶⁴ *Vesseron* case (United States v. Mexico), July 4, 1868, Opinion of Commissioner Wadsworth, III ms. *Opinions* 209, 210-211; *Martin* case, Commissioner Palacio for the Commission, *ibid.*, I ms. *Opinions* 70 (verification of Memorial before British vice-consul); *Murphy* case (United States v. Chile), Aug. 7, 1892, "Brief in Behalf of the Respondent," pp. 1-5, *Memorials, Briefs and Documents* (1892), vol. IV; *Faber* case (Germany v. Venezuela), Feb. 13, 1903, Ralston's Report (1904) 600, 621.

In the *Johnson* case before the United States-Peruvian Mixed Claims Commission of 1868, the Peruvian Commissioner having challenged depositions taken before American consuls, the Arbitrator said in his opinion: "It is true that depositions were made before the consul, but this is no irregularity before an international commission for the following reason: (1) The Convention provides that there shall be admitted 'all proofs or data submitted by the Governments or on their behalf' . . . (2) The Mixed Commission and the undersigned umpire has admitted and considered declarations and documents presented by the Government of Peru that had not been drawn up in strict conformity with the law, only having their authenticity guaranteed by the Minister of Foreign affairs. But this admission has taken place with the assent of both parties. It would be therefore contrary to all equity to reject in the present case proof presented on the part of the United States, the authenticity of which had not been questioned." *Ms. Proceedings and Awards* (1868) 395.

The arguments against the propriety of depositions being taken before consuls are summarized as follows in the brief in the *Murphy* case:

"The first question to be considered is whether the officials named are competent to act in the taking of testimony intended to be used in a case, and to have effect as against third parties.

"International law does not recognize as inherent to their office any such competence in diplomatic ministers; it accords them certain jurisdiction over the personnel of their families, official and personal, and over the members of their nation residing in the country where they are stationed,

As consular officers have authority to administer oaths and to execute instruments under seal in matters relating to the business of their office, there seems to be no good reason why an international tribunal may not properly authorize the taking of depositions before such officers of the parties to the proceedings. The argument occasionally advanced that such officers lack proper authority to perform such act because they are not authorized by local law to do so is obviously without sound foundation.⁶⁵

An interesting question with reference to the suppression of certain depositions because of the fact that they had been returned to the Commission unsealed arose in the domestic commission established under the act of March 2, 1827, to distribute the fund of \$1,204,960.00 paid by Great Britain under the Convention of November 13, 1826, as indemnity for slaves carried away by British forces during the War of 1812. The depositions in question had been introduced by certain Georgia and Louisiana claimants to rebut the presumption that the so-called Chesapeake claims were entitled to share in the fund. Speaking for the majority of the Commission (of three), Commissioner Seawell said:

"What is there if these depositions are allowed, to prevent an agent from withholding a deposition or even making an alteration? It is no answer to say, that the honorable handling of the agent in this particular case, and his known sense of propriety, would forbid it; rules must be universal as to men, and apply to all equally. The rules which the board have prescribed, relate only to *manner of taking and authentication*. It would have been impossible to point out every objection that the depositions when taken would be subject to. Would it be said that all the depositions of an agent, the depositions of an insane man, a deposition in the handwriting of the agent, a deposition taken before a magistrate who was a party or Agent, would have been allowed? Yet neither has been prohibited by the rules. It seems to me, at war with the first principles of common justice to allow a man to be prejudiced by evidence, when

but limited to acts that do not enter into the sphere of the civil jurisdiction properly so called.

"The power of consuls does not extend to the domain of contentious jurisdiction. It may be exercised, generally, in accordance with the provisions of treaties that nations may conclude to regulate the attributes of such officers, it is more or less ample according to the mutual convenience of the contracting parties. At any rate, they cannot take testimony except pursuant to a special commission issued out of the courts of their nation. . . .

"In a word, the principles of international law do not recognize in diplomatic ministers nor in consuls, *jure proprio*, competency to take depositions to be used in trials; these officers may take testimony valid in trials only when they have been specially commissioned by the court having cognizance of the cause." "Brief in Behalf of the Respondent," *Memorials, Briefs and Documents* (1892), vol. IV, pp. 2-4.

See also *supra*, secs. 47, 48.

⁶⁵ See *supra*, sec. 6.

its truth, or its falsehood is to depend upon the bare will of his adversary; & particularly, where there is a mode by which it can be prevented & the adversary entitled to the same benefits. The decision of the board, I consider as required, not only by rules of policy & justice, but sanctioned, by the universal practice of all courts, whether foreign or domestic international or municipal, whose rules I have any acquaintance with."⁶⁶

The claimants affected sought to obtain legislation extending the time for taking evidence to enable them to produce evidence to take the place of the suppressed depositions, but Congress declined to accede to their request.⁶⁷

Section 74. Correction and Approval of Record of Testimony by Witnesses. The practice of reading to a witness the record of his testimony given in court for his correction and approval is one derived from civil law procedure. It has been seen in section 72 that under French law a witness is permitted to make additions or alterations in the record which are written on the margin by the clerk. No such practice is known to Anglo-American law except in the case of depositions or statements taken on interrogatories out of court. The civil law practice in this respect was embodied in Article 54 of the 1922 Rules of the Permanent Court of International Justice:

⁶⁶ Ms. *Opinions*, Dept. of State, *Opinion on Suppressed Depositions*, pp. 2-3.

Commissioner Cheves said in part in his dissenting opinion:

"These depositions have everything requisite to give them *authority* according to the express and most solemnly promulgated & reiterated rules of this Board, and authority means 'legal power, influence, credit, *testimony*, *credibility*,' and yet we suppress them as utterly void and unworthy of consideration. . . . The search is after truth and whether a welcome or unwelcome fact be sought the course of investigation ought to be the same. I am sure my Brethern have the same object in view, but believing & knowing this, I ask what is meant by the idea that this is adversary testimony & therefore to be regarded in a light different from other testimony affecting the same issue? If it be said that two rules have not been adopted in this case I ask whether the Ex parte depositions filed in support of the presumption contended for by the Claimants in the 2d class have not been allowed, without any other authentication than that required by the original rule? It will be admitted—I ask then whether the more solemn and formal examinations now under consideration taken on interrogatories, with the opportunity of cross-examination, authenticated according to the same rule, have not been suppressed? It will be admitted. Have not, then different rules governed these respective decisions? When the Deposition of the claimants of the 2d class were allowed, there was time to retake them, according to the new rule prescribed by the Board, yet they were allowed. When the Depositions now under consideration were suppressed, there was no time to take them anew and the testimony will be utterly shut out unless Congress grant further time. Is this dealing equally by the parties? There have then been different rules applied to evidence affecting the same issue, and these rules in reference to the two parties litigant." *Mr. Cheves Opinion in relation to suppressed testimony.*

⁶⁷ I Moore's *Arbitrations* 385-390.

"A record shall be made of the evidence taken. The portion containing the evidence of each witness shall be read over to him and approved by him."

When the revision of the Rules was taken up in 1926, a new draft of this article was proposed, said to be in conformity with the practice of the Court in the case concerning *German Interests in Polish Upper Silesia*, the relevant paragraphs reading:

"A verbatim record shall be made of the oral proceedings, including the evidence taken, under the supervision of the Registrar.

"The portion containing the evidence of each witness shall be read over to him and approved by him."⁶⁸

In the *Upper Silesian* case, certain witnesses having been produced by the German and Polish Governments at the request of the Court, they testified before the Court. A verbatim record was made of their testimony and communicated to them with the understanding that any correction should be made and the corrected record read at the next sitting of the Court. The record was accordingly read, the President declaring the French text to be authoritative and as none of the witnesses desired to take advantage of the opportunity offered them to "make fresh observations," they signed their respective depositions. One of the witnesses who was absent had authorized the German Agent to sign for him, but the Court decided to reject the deposition.⁶⁹

In the lengthy discussion of the proposed new draft of Article 54, a divergence of opinion appeared on three principal questions: (1) Whether the record of the testimony should be read in the hearing in which it was given; (2) whether the witness should be permitted to sign the record in his own language if it was one other than French or English; (3) whether in "approving" the record of his testimony, the witness could make changes of substance, or only correct mistakes in the record, and whether he could refuse to sign, and, if so, what would be the effect.

M. Anzilotti aptly pointed out that all the questions disputed derived from a profound divergence of opinion between two systems of procedure, and said:

"According to one, only what was written was taken into account; hence arose the necessity for having evidence immediately summarized in writing and approved and signed by the witness. According to the other, however, which was freer and wider in scope, what mattered was the immediate and direct impression which the judge received from the evidence of the witness. The written record was only of secondary importance.

⁶⁸ This was said to be merely the codification of an invariable customary rule. Series D, No. 2 (add.), p. 311.

⁶⁹ Series E, No. 2, p. 192; Series C, No. 11-I, p. 36.

"The Court must choose between these two systems. All observations hitherto made related to one of them, and they ceased to apply if the other system were adopted. In a court like the Permanent Court of International Justice, the system based on the value of oral evidence was in M. Anzilotti's view the best. The witness's oral evidence given in the Court was decisive. A very free hand might be used in the regulation of everything else."⁷⁰

A modified version of the second paragraph suggested by Judge Moore was adopted:

"The report of the evidence of each witness shall be read to him in order that, subject to the direction of the Court, any mistakes may be corrected."

This Rule does not definitely dispose of any of the questions discussed, leaving the Court, in effect, free to follow its previous practice or to adapt that practice to any new situation. While on its face, it seems to indicate a step away from civil law procedure by limiting the witness to a mere correction of mistakes, the discussion accompanying its adoption makes it doubtful whether such a strict limitation was contemplated. Judge Moore pointed out that "it would rest with the Court to decide whether corrections were important or whether they were in the nature of a withdrawal," but added that "the witness must be able to look over this verbatim record, subject to the condition that, should he desire to make essential changes, these changes *should be previously submitted to the Court.*" [Italics added.] Lord Finlay "thought that witnesses should be able to make modifications not only of form but also of substance in their evidence," but that "it must not . . . be possible for them to render the record useless by refusing to approve it."⁷¹

⁷⁰ *Seriès D*, No. 2 (add.), p. 151.

⁷¹ *Ibid.* 138. In the digest of the practice of the Court in its Third Annual Report appears this statement:

"The present text of Rule 54 is the result of the revision of the Rules in 1926, taking into account the experience previously gained by the Court. In the first place, it is in accordance with the consistent practice of four years that a verbatim record should be made of the oral proceedings. It is further in accordance with the practice adopted in the upper Silesian case (see under *Statute*, Article 51) that this record include evidence taken.

"In this connection the Court considered the question whether it should adopt the system whereby the evidence of witnesses is recorded in writing at the hearing at which it is given, and approved and signed by them there and then during the hearing, this record being regarded as constituting the evidence; or the system whereby fundamental importance is attached to the impression received by the judge from the oral evidence of a witness, the record of his evidence being a matter of secondary importance which can be approved later. It having been observed that, at the time of the preparation of the original Rules of Court, verbatim records of the evidence had, in fact, already been contemplated, although the wording then adopted might leave room for doubt, the Court decided as stated above. . . .

"... the present text makes it clear that the record is intended faithfully to reproduce what a witness has actually said, and that, only, slips may be corrected." *Series E*, No. 3, pp. 207-209.

As no occasion has arisen for the application of the rule, it was left unchanged in the revisions of 1931 and 1936. (Article 60, 1936 Rules).

In *ad hoc* arbitral proceedings when the testimony of witnesses is taken by deposition, it is customary to read the deposition to the witness and to permit him to make corrections before signing. In some cases it is specifically provided that additions may be made, "but without erasure or interlineations."⁷² The records do not clearly indicate what practice is followed in this respect where testimony is given before the tribunal, but in some instances it appears that witnesses have been allowed "to correct the record" of their testimony in such circumstances.⁷³ As the written record assumes such great importance in international judicial proceedings, both during the proceedings, and as a permanent record of the basis of the decision, the practice of allowing a witness to make certain that the record of his testimony accords with what he intended to say seems a highly desirable one. Such action should always be subject to the control of the tribunal, as it is important that the record should reflect as nearly as possible what actually transpired during the proceedings.

Section 75. Credibility and Impeachment. The technical rules concerning the credibility and the impeachment of witnesses obtaining in municipal procedure, both Anglo-American and Civil, are not generally enforced in proceedings before international tribunals.⁷⁴ Two principal reasons seem to account for this: First, the practical necessity of obtaining sufficient information upon which to reach a conclusion has compelled international tribunals to eschew stringent rules concerning the character and quality of the evidence admitted; secondly, the essential purpose of international arbitration to arrive at the truth by whatever means that

⁷² United States and New Granada, Mixed Claims Commission, Sept. 10, 1857, Rules, Art. 2, ms. *Journal of Proceedings* (1857) 8-9; United States-French Mixed Claims Commission, Jan. 15, 1880, Rules, Art. XV (c), *Minutes of Proceedings*, p. 63.

⁷³ "The British agent presented a witness who was examined, cross-examined, and re-examined 'in accordance with the English system,' and to whom certain questions were put by the Arbitrator. This witness was permitted to correct the record of his testimony which he signed." Manley O. Hudson, "The Chevreau Claim," 26 A.J.I.L. 804 (1932).

The International Water Boundary Commission, United States and Mexico, March 1, 1889, followed the practice of having witnesses testimony read to them and allowing them an opportunity to correct it. *Proceedings, Equitable Distribution of the Waters of the Rio Grande* (Washington, 1903), vol. 1, pp. 117ff.

⁷⁴ For an elaborate exposition of the rules relating to testimonial impeachment in Anglo-American law, see II Wigmore's *Evidence*, secs. 874-1144. Bodington gives a good brief resume of the rules of impeachment in French procedure, *op. cit.* 96-98. The German Code of Civil Procedure accords to certain interested witnesses the right to refuse to testify instead of giving the parties a right to impeach such testimony. See Arts. 383-390 of the 1933 Code.

may be available has resulted in the practice of testing evidence on its intrinsic merit rather than with reference to fixed rules of practice and pleadings.⁷⁵ These factors, combined with the propensity of tribunals for stating conclusions without elucidating the principles by which they were guided in testing the credibility of witnesses and weighing their testimony, makes it difficult to speak with certainty on this matter. Certain basic principles, however, are discernible in the adjudicated cases.

Exaggeration and misrepresentation of facts by a witness may not of itself discredit his entire testimony if there are circumstances to show that the basic facts stated by him are entitled to credence.⁷⁶ However, when a witness purports to state facts which it appears inherently incredible that he ever knew, or, if he did, that he could remember them in detail after a long lapse of time, his entire testimony will be held discredited.⁷⁷ Likewise, witnesses testifying in identical language concerning complex or remote facts will not ordinarily be considered entitled to belief.⁷⁸ A witness testifying to alleged events contradicted by known historical facts is, of course, completely discredited.⁷⁹ The presumption is against the credibility of testimony given by a number of claimants in mutual support of their various claims. If corroborated by other evidence, such testimony may be accorded some weight, but not if standing alone, unless the general credibility of the witness is established by satisfactory evidence.⁸⁰

It has been held that the identity and credibility of unknown witnesses need to be established by the testimony or certification of some person in an official position which lends weight to his assertions, or of someone known to the tribunal.⁸¹ This cannot be taken as a hard and fast rule, however, as there may, in some cases, be special grounds for accepting as credible the testimony of persons not especially vouched for by others.⁸² There should,

⁷⁵ Cf. *supra*, secs. 2, 3.

⁷⁶ *Faulkner* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1927) 86, 90-91; *Mallen* case, *ibid.* 254, 255-256. See, however, question raised by Justice Brewer concerning the reliability of a witness who had lied in another connection to protect the interests of his Government. *British Guiana-Venezuela Boundary Arbitration*, Feb. 2, 1897, *Proceedings* (1899), vol. IV, pp. 1023, 1027.

⁷⁷ *Torres* case (United States v. Mexico), July 4, 1868, II ms. *Opinions* 104, 108 (Opinion of Umpire Lieber).

⁷⁸ *Orik* case, *ibid.*, VI ms. *Opinions* 335 (Opinion of Umpire Thornton).

⁷⁹ *Arnett* case, *ibid.*, V ms. *Opinions* 374-376 (Commissioner Zamacoma for the Commission).

⁸⁰ *Ireland* case, *ibid.*, V ms. *Opinions* 251-252 (Commissioner Zamacoma for the Commission).

⁸¹ *Hayden* case, Board of Commissioners, Act of March 3, 1849, ms. *Opinions*, 1849, vol. 2, pp. 817-820, 829-831.

⁸² In the *Harwell* case before the United States-Mexican Mixed Claims Commission of 1868, Commissioner Zamacoma objected to accepting the claimants' statements when only confirmed "by the simple statements of two or three witnesses . . . without any special grounds for credibility." Umpire Thornton made an award of \$1,000, however, stating that because of the

in general, be no necessity for submitting evidence to establish the credibility of a responsible official of one of the parties to the proceedings.⁸³

Witnesses testifying to contradictory statements at different times during the same proceedings thereby discredit their whole testimony, unless there is corroborating evidence to show which of the conflicting statements is true.⁸⁴ Applying this principle, Umpire Thornton, in the *Dubois* case before the United States-Mexican Mixed Claims Commission of 1868, declined to attach any credence to the testimony of four witnesses because the consular officer who had certified their affidavits as being entitled to full faith and credit later testified under oath to facts in direct contradiction to those contained in the affidavits.⁸⁵

In some cases an award has been refused where essential testimony by a witness whose claim to credibility was doubtful was not corroborated by supporting evidence, especially if the circumstances indicated other evidence to be available.⁸⁶

It is perhaps unnecessary to state that testimonial evidence is subject to impeachment for fraud equally with documentary evidence, and will be rejected if shown to be fraudulent. The entire testimony of a witness, part of whose testimony has been proved to be false or fraudulent, will not necessarily be thrown out, but the remaining portions would probably be considered insufficient basis for an award unless corroborated by other evidence.

established poverty of the claimant the evidence in support of his claim was not as elaborate as in some other cases, but that it was, "perhaps for this very reason more worthy of belief." V ms. *Opinions*, 27-28, VII ms. *Opinions* 452.

See *Bentin-Dejardin v. E. Dall* (Franco-German Mixed Arbitral Tribunal) 8 *Recueil des décisions* 80 (1927).

⁸³ *Denham* case (United States v. Panama), July 28, 1926, "Brief of the United States," Hunt's Report (1934) 202. See, however, opinion of Commissioner Wadsworth, *Burnham* case (United States v. Mexico), July 4, 1868, V ms. *Opinions* 499.

⁸⁴ *Tripler* case, *ibid.*, VII ms. *Opinions* 375-377 (opinion of Umpire Thornton).

⁸⁵ III ms. *Opinions* 591-592.

⁸⁶ *Willard* case (United States v. Germany), August 10, 1922, *Administrative Decisions and Opinions*, etc., July 1, 1925, to October 1, 1926 (Washington, 1926) 641, 643, (award for permanent injuries denied; award on other items of \$2000 and \$1,423); *Wyman* case (United States v. Mexico), July 4, 1868, VII ms. *Opinions* 291 (opinion of Commissioner Zamacoma, claim dismissed by Umpire Thornton, VI ms. *Opinions* 487); *Hill (Senior)* case, *ibid.*, I ms. *Opinions* 57 (Commissioner Palacio for the Commission). See also opinion of Commissioner Zamacoma, *Barrington* case, *ibid.*, IV ms. *Opinions* 493 (the Umpire did not accept Zamacoma's views, making an award of \$12,000, saying the proof was concise and no evidence had been submitted by defense to refute evidence submitted by claimant and his witnesses, VII ms. *Opinions* 425); *Leach* case (United States v. Chile), May 24, 1897, dissenting opinion of Commissioner Gage, June 8, 1901, pp. 197-202, in Perry's Report (1901).

EXPERTS AND EXPERT ENQUIRIES

Section 76. General Practice. Provision for the use of the testimony of experts or for the making of expert inquiries is not frequently made in arbitral agreements or in the rules of the tribunals.⁸⁷ However, there is nothing to prevent tribunals from requiring the production of expert witnesses under their usual power to call for further explanations or evidence when deemed necessary.⁸⁸ One class of cases in which expert testimony is frequently resorted to is boundary arbitrations. Cartographers and geographers may be called upon to testify orally or to make written reports, based either upon a general study of the situation or a specific investigation of the region in dispute, or maps by them may be introduced in evidence. As previously indicated, such testimony varies greatly in value, according to the circumstances of the case as well as the particular qualifications of the witnesses.⁸⁹ Such testimony if offered, however, is almost universally admitted for what it is worth, its evaluation resting in the discretion of the

⁸⁷ *Costa Rica Packet case* (Great Britain v. Netherlands), Convention of May 16, 1895, Art. 6, La Fontaine, *Pasicrisie Internationale*, p. 510; *Norwegian Claims case* (United States v. Norway), June 30, 1921, Art. III, Treaty Series No. 654; French-Mexican Claims Commission, September 25, 1924, Rules, Art. 34, *Règlement de procédure* (1925); German-Mexican Claims Commission, March 16, 1925, Rules, Art. 34, *Convención de reclamaciones*, etc. (1926); British-Mexican Claims Commission, November 19, 1926, Rules, Art. 31, *Decisions and Opinions*, p. 14; Italian-Mexican Claims Commission, January 13, 1927, Rules, Art. 32, *Reglas de procedimiento* (1931). As an exception to this, however, see the rules of the various Mixed Arbitral Tribunals established under the peace treaties at the end of the World War in which provision was commonly made for the appointment of experts and the reception of reports made by them. See *Recueil des décisions*, vol. 1, *passim*. Resort was had to this procedure in numerous cases. For example, see *Huret v. Etat allemand* (Franco-German Tribunal) 1 *Recueil des décisions* 98, 488 (1921); *Lirens v. Etat allemand* (German-Belgian Tribunal) 2 *Recueil des décisions* 82 (1922); *Compagnie d'Électricité de Sofia et de Bulgarie v. Etat bulgare et Municipalité de Sofia* (Bulgarian-Belgian Tribunal) 3 *Recueil des décisions* 308, 323 (1923).

⁸⁸ See *supra*, sec. 32. See also *Manica Boundary Arbitration* (Gt. Britain v. Portugal), Jan. 7, 1895, award of M. Paul Vigliani, Jan. 30, 1897, La Fontaine *Pasicrisie internationale*, pp. 486, 494-495; *Delagoa Bay case* (United States and Great Britain v. Portugal), June 13, 1891, *ibid.* 408.

⁸⁹ See *supra*, sec. 49.

"... maps perform the function of pictorially expressing the views of the particular geographer or map maker who may have been instrumental in bringing about their publication. They furnish us, therefore, with the opinions of a particular class of experts; and the value of this kind of testimony depends largely upon the special circumstances of each case." Severo Mallet-Prevost, "Report upon the Cartographical Testimony of Geographers," in *British Guiana-Venezuela Boundary Arbitration*, February 2, 1897, *Counter-Case of United States of Venezuela*, (New York, 1898), vol. 2, p. 267.

During the oral proceedings in the same arbitration, the British Government having introduced the report of a geographical expert, Mr. im Thurm, counsel for Venezuela, asserted that nothing he could say "here" could "be accepted as evidence." British counsel acquiesced in this view. *Proceedings* (1899), vol. I, pp. 47-49.

tribunal. Tribunals have themselves, in some cases, called for a survey by experts of the region in dispute when the cartographical evidence submitted by the parties appeared inadequate.⁹⁰

Expert testimony of various kinds has been invoked by parties occasionally and relied upon by tribunals, including the testimony of physicians, surveyors, lawyers, patent experts, fisheries experts, etc.⁹¹ Generally speaking such testimony would seem to be subject to the same rules as to admission as other evidence of a like category.⁹² In evaluation it is subject to additional tests of fitness, according to the nature of the subject matter dealt with by the witness, and in this respect the principles developed in municipal procedure would seem to be equally applicable, as a general rule, in international procedure.⁹³

In Anglo-American law, Wigmore suggests that the Court has to determine two primary questions in any case in which it is sought to use expert witnesses: (1) Whether for a particular subject of testimony the general or ordinary experience of a layman

⁹⁰ *Guatemala-Honduras Special Boundary Tribunal*, July 16, 1930, *Opinion and Award* (Washington, 1933) 70-71 (photographs and map of an aerial survey).

⁹¹ *Clark case* (United States v. Mexico), September 8, 1923, *Opinions* (1929) 131-132 (physician); *de Sabla case* (United States v. Panama), July 28, 1926, *Hunt's Report* (1934) 387, 448 (licensed surveyor); *Foucher case* (United States v. France), January 15, 1880, *Boutwell's Report* (1884) 90-92 (lawyers); *Submarine Signal Claim* (United States v. Germany), August 10, 1922, *Bonyng's Report* (1934) 155, 157-158 (patent experts); *Fur Seal Arbitration* (United States v. Great Britain), February 20, 1892 (fisheries experts). *Proceedings* (1895) vol. XI.

⁹² "Mr. Peirce [counsel for the United States] protested against the introduction of a deposition by Mr. Grebnitsky, an expert who is not present.

"The Arbitrator said that each State can name the expert it wants, thus Mr. Komarow could have been named in the capacity of expert. In an arbitration between States it is of far greater interest than in purely juridical proceedings to draw forth all evidence, whether direct or indirect, which may serve to give full light.

"Mr. Peirce said that as Mr. Grebnitsky is not present he can not be cross-examined.

"The Arbitrator observed that the hearing of the experts by the arbitrator could have taken place without the presence of the other party.

"Mr. Peirce again said that it can not be known whether the deposition of Mr. Grebnitsky is entirely correct. The document in question was prepared by him for his own Government.

"The Arbitrator said that he will take into consideration that the figures have not been discussed. Besides, he states that in the affair of the Costa Rica Packet Mr. de Martens sat at Brussels and discussed with the experts. A debate with the experts did not take place.

"Mr. Peirce, after having again stated that Mr. Grebnitsky was obliged to make as favorable report as possible to his Government, he says that he will submit to the decision of the arbitrator. He wishes, however, that his protest be inserted in the verbal proceedings.

"The Arbitrator said again that these are not evidence, and that it is to the interest of both parties not to be too strict as to form. He will, however, take account of what the delegate of the United States says." *Whaling and Sealing Claims case* (United States v. Russia), September 3, 1900, 1902 *For. Rel.*, Appendix I, 428.

⁹³ For general discussion of the required qualifications of particular experts, see I Wigmore's *Evidence* 972-984.

is sufficient; (2) if not, what sort of special experience is necessary. With respect to the former, he suggests the following canon: "No special experience shall be required unless the matter to be testified to is one upon which it would clearly be presumptuous, under the circumstances of the case, for a person of only ordinary experience to assume to trust his senses, for the purposes of his own action in the ordinary serious affairs of life." With reference to the second, two rules of method are applicable. (1) "The possession of the required qualifications by a particular person offered as a witness, must be expressly shown by the party offering him; (2) . . . the trial Court must be left to determine, absolutely and without review, the fact of possession of the required qualification by a particular witness."⁹⁴ These principles are substantially applicable in international procedure, subject to the qualification that in such procedure, in the absence of an order from the tribunal, the parties determine for themselves whether the case calls for the use of expert testimony. The tribunal could only refuse under exceptional circumstances to admit such testimony if offered. Experts are commonly selected and paid by the parties in Anglo-American procedure, but the Court decides whether the facts are such as to call for the admission of expert testimony.

Evidence furnished by expert witnesses or obtained through an inquiry by experts (*expertise*) normally stands in high repute in the procedure of civil law countries, being second in importance only to so-called "authentic" documents. In French procedure, when the Court considers a report of experts necessary, it so orders in an interlocutory judgment which must set forth clearly the objects of the inquiry. The investigation is made by experts selected by the parties if they are in agreement, usually from a list prepared by the Court, and, if not, by the Court. Parties may challenge experts appointed by the Court, but are liable to the payment of damages if the challenge is rejected, even to the extent of paying damages to the expert challenged if he demands it. If it is not satisfied with the report, the Court may order a new investigation, or even appoint new experts.⁹⁵ It is to be doubted whether an international tribunal has the power to appoint a commission of enquiry in the absence of a specific grant of authority in the arbitral agreement. Nor would the technical rules concerning chal-

⁹⁴ *Ibid.* 962-963.

⁹⁵ *Code de procédure civile annoté*, etc., par M. Henry Bourdeaux, trente-troisième ed. (Paris, 1936), Arts. 302-323. See Bonnier, *op. cit.* 91-98, 608; Garsonnet and Cézair Bru, *op. cit.* 334, 344. For discussion of Italian law, see Lessona, *op. cit.*, vol. IV, pp. 526, 557-558, 589-590, 671-672. The provisions in German law relating to evidence by experts are substantially similar to those of French law. See Arts. 402-414 of the 1933 Code of Civil Procedure.

lenge of the appointment of an expert, or payment of damages on the rejection of such challenge be applicable in international procedure.

Expert testimony, says Engelmann, "like everything else capable of influencing the judicial conviction, had a place in Roman civil procedure." The use of experts was resorted to especially in actions concerning land, sworn government surveyors known as "agrimensores" appearing in boundary disputes. They acted as assistants to the judge, however, rather than as witnesses.⁹⁶ Commissions of experts appointed by an international tribunal to make an inquiry, in effect, fill a similar capacity.

Section 77. In the Permanent Court of International Justice. The Statute of the Permanent Court of International Justice contemplates the use in proceedings before the Court both of expert witnesses and of enquiries by commissions of experts. Experts are among those whom it is provided in Article 43, that the Court shall hear during the oral proceedings. Under this provision the parties may produce experts to be heard as witnesses, or to give an expert opinion, although it does not appear that the latter has ever been done.⁹⁷ A party contemplating producing an expert must inform the Court and, through the Registry, the other parties, "in sufficient time before the opening of the oral proceedings" of his name, Christian name and residence, giving a general indication of the point or points to which his testimony is to refer.⁹⁸ The Court may itself invite the parties to call experts.⁹⁹ The control of the questioning of experts is left for regulation by the Rules.¹⁰⁰ Article 53 of the 1936 Rules provides that "witnesses and experts shall be examined by the agents, counsel or advocates of the parties under the control of the President," and that "questions may be put to them by the President and by the judges." Experts may be examined otherwise than before the Court itself, either at the request of one of the parties or upon the initiative of the Court.¹⁰¹ Experts are required to make the following declaration before making a statement in Court: "I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief."¹⁰² Apparently, the same declaration would be required of an expert examined outside the Court.

⁹⁶ *Op. cit.* 362.

⁹⁷ Hudson, *Permanent Court*, p. 505. Series E, No. 3, p. 213.

⁹⁸ 1936 Rules, Art. 49, Appendix II.

⁹⁹ 1936 Rules, Art. 54, Appendix II.

¹⁰⁰ Statute, Art. 51, Appendix I.

¹⁰¹ 1936 Rules, Art. 56, Appendix II.

¹⁰² 1936 Rules, Art. 53, Appendix II. This differs from the declaration required of an ordinary witness: "I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth."

The Court is authorized by Article 50 of the Statute, at any time to "entrust any individual, body, bureau, commission or other organization that it may select with the task of carrying out an enquiry or giving an expert opinion." In its rules (Article 57) the Court has provided that an order for such an enquiry shall be made "after duly hearing the parties" and shall state "the subject of the enquiry or expert report," and set out "the number and appointment of the persons to hold the enquiry or of the experts and the formalities to be observed." Reports or records of enquiries must be communicated to the parties. A difference of opinion appeared during the preparation of the 1936 Rules as to whether a party might request the Court to make an expert enquiry, and if so whether the Court would be bound to order the enquiry. There would seem to be nothing to prevent a party from making such a request, as has in fact been done,¹⁰³ but whether the Court shall order the enquiry seems to be discretionary under Article 50 of the Statute and Article 57 of the Rules.¹⁰⁴ A party may on its own initiative produce expert witnesses, conduct an expert enquiry and submit the report as a part of its documentary evidence.

Expert witnesses appear to have been examined before the Court on but one occasion, although opinions of lawyers as experts have been presented in several cases.¹⁰⁵ Expert witnesses were called by the German and Polish Governments in pursuance of an order of the Court of March 22, 1926, requesting further information in regard to the Ballestrem and Giesche suits in the case concerning *German Interests in Polish Upper Silesia*.¹⁰⁶ Upon objection

¹⁰³ See *infra*, pp. 238-240.

¹⁰⁴ "M. Guerrero, Vice President, thought that since the Statute gave the Court power *proprio motu* to order an expert report or enquiry, it was inconceivable that it should not also allow a party to ask the Court to order an enquiry or expert report. The fundamental principle was that a party was entitled to produce any evidence, the appraisalment of the value of evidence produced resting with the Court. The effect of M. Fromageot's text might however be to suppress the right to adduce evidence in the shape of an expert report. If the request were made before the elapse of the prescribed time-limit, the Court could not do otherwise than order the expert report desired.

"M. Anzilotti pointed out that a party could itself produce its own expert report; this would constitute *ex parte* evidence and would come under Article 47 of the Rules. But if the party applied to the Court and asked for an expert enquiry on a given point, it would no longer be a question of *ex parte* evidence but of the exercise by the Court of powers appertaining to it.

"It was of no great consequence whether these powers were derived from Article 50 or from a general principle of procedure not stated in the Statute. In any case, the Court had power to order an expert report. That was a power which it might or might not exercise at its discretion." Series D, No. 2 (3d add.), p. 246, eleventh meeting, February 13, 1935.

¹⁰⁵ Hudson, *Permanent Court*, p. 505 citing Series C, No. 3 (vol. 2), pp. 121, 134ff.; No. 3 (vol. 3, pt. I), pp. 442ff.; No. 7-I, p. 226; No. 13-II, p. 350; No. 14-I, pp. 166, 272, 287.

¹⁰⁶ Series A, No. 7, p. 13.

by the German agent to certain questions put by the Polish agent during examination and cross-examination, the Court reserved "its opinion as to the importance to be attached to the questions put and replies given." The witnesses were questioned by the President and the judges as well as by the Agents.¹⁰⁷

The provisions regarding experts are apparently regarded as applicable in advisory cases. In an order of June 30, 1930, in the *Greco-Bulgarian "Communities"* case, the Court declared that it was necessary to supplement the information furnished in the written documents and in the oral proceedings, and propounded a series of questions to be answered by the President of the Greco-Bulgarian Mixed Commission.¹⁰⁸ During the proceedings in the case concerning *Competence of the International Labor Organization to Regulate, Incidentally, the Personal Work of the Employer*, the Court decided that the International Federation of Trades Unions should be allowed to produce experts. It was decided, however, that "(1) the experts should not be treated as witnesses and (2) they should be invited to reply to questions put by the representatives of international organizations, and if necessary, by the Court."¹⁰⁹

There is also a paucity of practice on which to evaluate the import of the provisions relating to expert enquiries and reports. In its judgment in the *Chorzow Factory* case (No. 13), the Court declared that not being satisfied with the data for the assessment of the indemnity to be paid by Germany, it would, before giving any decision, "in order to obtain further enlightenment in the matter . . . arrange for the holding of an expert enquiry in conformity with Article 50 of its Statute."¹¹⁰ Provision was made for the establishment of the Committee of experts by an order of September 13, 1928, and the three members of the Committee appointed by an order of the President of October 16, 1928. The parties were permitted to appoint assessors. After the Committee had held a number of sessions in which it had decided to visit the factories, and propounded certain questions to be answered by the assessors, it was dissolved, by an order of December 15, 1928, before completing its report, as the parties had reached an agreement settling the dispute.¹¹¹ The Court drew its order establishing the Committee in such a way as to make the parties responsible for its convocation, and hence liable for any costs resulting from its investigations.¹¹² In connection with a dis-

¹⁰⁷ Series C, No. 11, vol. I, pp. 25-37.

¹⁰⁸ Series C, No. 18-I, pp. 1077-1078.

¹⁰⁹ Series E, No. 3, p. 213; Series C, No. 12, pp. 12, 287-288. The experts were not heard, as the organization decided that their evidence was not required.

¹¹⁰ Series A, No. 17, p. 51.

¹¹¹ *Ibid.* 99; Series C, No. 16-II, pp. 12-24; Series A, No. 19, pp. 14-15.

¹¹² Series D, No. 2 (3d add.), p. 825.

cussion of this case during the preparation of the 1936 Rules, the Registrar stated that "both the composition of the Committee and the terms of the declaration [required of the experts] had been settled having regard to the special circumstances of the case." Consequently, Article 57 of the Rules was drafted on broad lines leaving the details of procedure in the institution of an expert enquiry to be settled by the Court in the order arranging for it.¹¹³

In two instances the Court has exercised its discretionary authority to refuse to order an enquiry requested by one or more of the parties. A request was made by the French Government in the *Free Zones of Upper Savoy and the District of Gex* case that "the Court should order an expert enquiry to be undertaken and that it should arrange for an investigation on the spot by a delegation of its members." This request was rejected by the Court on the ground that since it had decided that its judgment "must be limited to questions of law," the request ceased to have any object.¹¹⁴ In the *Oscar Chinn* case, after pointing out the wide discrepancies in the figures furnished by the two parties as to the volume of traffic enjoyed by the various companies operating in the Belgian Congo, the British Government requested that an expert enquiry be instituted to determine whether a *de facto* monopoly had in fact been accorded to Unatra (the Belgian company) by the decrees of the Belgian Government. It had contended that a *de facto* monopoly had been established, and that this action represented a violation of Belgium's international obligations. It agreed, however, in making this request that if, on the evidence before it, the Court should feel competent to rule against the British contention as a matter of law, there would be "no use holding an enquiry to ascertain whether there was a *de facto* monopoly, if a *de facto* monopoly creates no cause of action."¹¹⁵ The Court

¹¹³ *Ibid.* 624-625. The declaration made by each expert and assessor was as follows: "I solemnly declare that I will perform the duties of expert (assessor) entrusted to me by virtue of the order of the Permanent Court of International Justice dated September 13, 1928, honorably and faithfully, impartially and conscientiously, and that I will abstain from divulging or turning to my own use any secrets of an economic or technical nature which may come to my knowledge in the performance of this task." Series C, No. 16-II, p. 17.

¹¹⁴ Series A/B No. 46, p. 162. The Court declared that it could not "interpret the relevant provision of Article 4, paragraph 2, of the Special Agreement, as meaning that it would be bound in any event to comply with such a request." *Ibid.* 162. That Article provided that either party might request the Court "to delegate one or three of its members for the purposes of conducting investigations on the spot and of hearing the evidence of any interested persons." *Ibid.* 99.

The Swiss Government had previously requested "an expert enquiry regarding the solutions proposed by the Parties for the settlement of the zone's regime," but withdrew its request on being informed that it would probably be necessary to reconstitute the Court for the remainder of the case in order to hold the suggested hearing. *Ibid.* 105-106; Series C, No. 19-I, vol. V, pp. 2215-2231.

¹¹⁵ Series C, No. 75, pp. 214-220, 239-240.

declined to order the enquiry, holding that even if there had been created a concentration of business of the nature alleged by Great Britain, it would "only infringe freedom of commerce if commerce is prohibited by the concession of a right precluding the exercise of the same right by others." The Court asserted that it saw "nothing in the measure taken by the Belgian Government indicative of such a prohibition."¹¹⁶

Granting the correctness of the principle adopted by the Court, that is that a *de facto* monopoly did not infringe the rights of other parties even if it excluded them absolutely from carrying on any commerce, so long as they retained a theoretical right to continue in business, the correctness of the conclusion can hardly be questioned. However, the propriety of proceeding to a decision with the principal question of fact still in controversy at every point is open to question, as suggested in the dissenting opinions.¹¹⁷ It is quite conceivable that a resolution of the question of fact strongly in favor of the British contention might have changed the views of some of the judges with respect to the question of law on which the decision turned. A practice which disregards available means of resolving hotly contested questions of fact is not one calculated to inspire the confidence of prospective litigants in international tribunals. "The Court cannot omit to use any means which may enable it to ascertain the objective truth," declared Jonkheer Van Eysinga in his separate opinion. "As regards the obtaining of evidence, the Statute provides that the Court shall take active steps and not adopt a passive attitude."¹¹⁸ It is essential to observe finally, however, that in this particular case the Court's action may have been prompted partly by the broad admission made by the British Agent as to the effect on his request for an enquiry, of an adverse decision on the contention of his Government concerning the relevant question of law.

¹¹⁶ Series A/B, No. 63, pp. 84-86.

¹¹⁷ In his dissenting opinion Judge Anzilotti declared: ". . . seeing that the case depended mainly on the appraisal of the facts, as the special Agreement expressly says in the very terms of the question to be answered, the court, in my opinion, ought not to have hesitated. Being confronted with the alternative of rejecting the main plea of the Government of the United Kingdom, for lack of evidence, or of exercising the powers conferred on it by the Statute and ordering the production of the necessary evidence, it should have taken the latter course." *Ibid.* 109.

Sir Cecil Hurst in dissenting said that in his opinion the essential contention of the United Kingdom was that the Belgian measures were inconsistent with Belgium's international obligations "because of the consequences which they involved [namely, of forcing Chinn out of business] and which the Belgian Government should have foreseen that they involved." He concluded that the enquiry requested by Great Britain would have been of no use as it would only have shown the effect of the Belgian measures on other Belgian companies, and the extent to which they had been willing to devote their financial reserves to keeping their fleet going. It would not have gone to the essential question whether the measures made Chinn's continuing in business impossible. *Ibid.* 116-121.

¹¹⁸ *Ibid.* 146.

Section 78. Visit to the Place (descentes sur les lieux). A further means of obtaining information concerning the facts in dispute, commonly called in civil law procedure "*descentes sur les lieux*," and which is not strictly speaking a matter of evidence, may be considered briefly here. It is a device borrowed from civil law procedure in which provision is commonly made for a visit by the members of the court to the place or premises involved in cases where information gained by personal inspection may be of special value in elucidating disputed questions.¹¹⁹

International tribunals have resorted only occasionally to this means of supplementing the information contained in the evidence produced before them. In the "*Meerauge*" Boundary Arbitration between Austria and Hungary under Austrian and Hungarian laws of 1897, the tribunal visited the region of the disputed boundary.¹²⁰ Likewise in the *Grisbadarna* case between Norway and Sweden in 1909, the tribunal made an extensive trip to the area of the disputed boundary and embodied an account of it in the record of the proceedings.¹²¹ Such a procedure seems to have considerable potential usefulness in boundary arbitrations.¹²² In the *Ben Tillet* case between Belgium and Great Britain under the agreement of March 19, 1898, the arbitrator visited the prison where Tillet had been imprisoned "in order, by means of a full knowledge of the case, to solve certain questions which seemed doubtful to me [him]," and "held an inquiry in the Antwerp prison itself."¹²³ Tribunals have, in some instances, made provision in their rules of procedure for a visit to the place.¹²⁴

¹¹⁹ See, for example, Articles 295-301 of the French Code of Civil Procedure. *Code de procédure civile*, annoté, etc., par M. Henry Bourdeaux trente-troisième ed. (Paris, 1936). See also Garsonnet and Cézard Bru, *op. cit.* 334; Bonnier, *op. cit.* 85-86; Lessona, *op. cit.* vol. V, pp. 15-17.

It may be noted, however, that, in Anglo-American procedure, the jury may, when the necessity arises, and in the discretion of the court, view the object or visit the scene involved in the proceedings. Whenever the judge is the tribunal of fact, instead of the jury, he "may have view" just as the jury might. II Wigmore's *Evidence* 690-709.

¹²⁰ *Arbitral Award*, Sept. 13, 1902, Martens, *Nouveau recueil général de traités*, 3d Ser., vol. 3, pp. 71, 72.

¹²¹ *Recueil des comptes rendus de la visite des lieux*, etc., The Hague, 1909.

¹²² It has been customarily resorted to by the International Boundary Commission between the United States and Mexico, under the Convention of March 1, 1889. See *Proceedings, Equitable Distribution of the Waters of the Rio Grande* (Washington, 1903), *passim*.

¹²³ *Arbitral Award*, Dec. 26, 1898, 92 Br. and For. St. Paps. 105 (1899-1900); Br. Parl. Paps. [Cmd. 9235]. Commercial No. 2 (1899).

¹²⁴ German-Belgian Mixed Arbitral Tribunal, Rules, Art. 55, 1 *Recueil des décisions* 40; Franco-German Mixed Arbitral Tribunal, Rules, Art. 61, *ibid.* 52. For similar provisions in the rules of a number of the other Mixed Arbitral Tribunals, see 1 *Recueil des décisions*, *passim*. French-Mexican Mixed Claims Commission, Sept. 25, 1924, Rules, Art. 34, *Règlement de procédure* (1925); British-Mexican Mixed Claims Commission, Nov. 19, 1926, Rules, Art. 31, *Decisions and Opinions*, p. 12; German-Mexican Mixed Claims Commission, March 16, 1925, Rules, Art. 34, *Convención de reclamaciones*,

During the proceedings before the Permanent Court of International Justice in the *Diversion of Water from the Meuse* case, the Agent of the Belgian Government suggested "that the Court should pay a visit to the locality in order to see on the spot all the installations, canals and waterways to which the dispute related."¹²⁵ Although there is no specific provision either in the Statute or Rules of the Court for such action, the Court appears to have entertained no doubt as to its authority to carry out the suggestion.¹²⁶ As the "suggestion met with no opposition on the part of the Netherlands Government . . . the Court decided, by an Order made on May 13, 1937, to comply with it." It adopted "the itinerary jointly proposed by the Agents of the Parties," and "carried out this inspection on May 13, 14 and 15, 1937." Further, "it heard the explanations given by the representatives who had been designated for the purpose by the Parties and witnessed practical demonstrations of the operation of locks and of installations connected therewith."¹²⁷ What use, if any, the Court may have made of the information thus gained is not indicated in its judgment.¹²⁸ Judge Hudson has observed that "the Court viewed the Belgian suggestion, not as an offer to present evidence, but as an invitation to the Court to procure its own information."¹²⁹

While such a device obviously has limited usefulness, authority should be granted to the tribunal in the arbitral agreement to resort to it, in cases where a knowledge of the place or premises seems likely to be useful or essential. To quote again the comment of Judge Hudson on the *Meuse* case, "an international tribunal cannot ignore the possible usefulness of such procedure, not only for ensuring that results will be arrived at on the basis of the fullest possible information, but also for creating that support in public opinion which is the one sure sanction of its judgments."¹³⁰

etc. (1925); Italian-Mexican Mixed Claims Commission, Jan. 13, 1927, Rules, Art. 32, *Convención de reclamaciones entre Mexico y Italia*; Spanish-Mexican Mixed Claims Commission, Nov. 25, 1925, Rules, Art. 36, *Reglas de procedimiento* (1927).

¹²⁵ Series A/B, No. 70, p. 9; Series C, No. 81, pp. 217-218.

¹²⁶ In the case of the *Free Zones of Upper Savoy and the District of Gex*, the Special Agreement of Oct. 30, 1924, submitting the case to the Permanent Court of International Justice provided in paragraph 2 of Art. 4: "Furthermore, in order to facilitate this settlement the Court may be requested by either party to delegate one or three of its members for the purposes of conducting investigations on the spot and of hearing the evidence of any interested persons." Series A/B, No. 46, p. 99.

¹²⁷ Series A/B, No. 70, p. 9.

¹²⁸ The Minutes of the Court's visit to the places concerned, consisting of the itinerary with a bare summary statement of the persons heard, were attached to the record of the Court's public sitting of May 18, 1937. Series C, No. 81, pp. 222-223.

The expenses of the trip were paid out of the Court's funds. Series E, No. 13, p. 152. For provision for payment of such expenses in *Resolution Concerning the Regulations for the Repayment of Traveling Expenses of Judges* adopted by the Tenth Assembly of the League of Nations, Sept. 14, 1929, see Series D, No. 1 (3d ed.), p. 65.

¹²⁹ "Visits by International Tribunals to Places concerned in Proceedings," 31 A.J.I.L. 696, 697 (1937).

¹³⁰ *Ibid.* 697.

CHAPTER VII

EVIDENCE SUBJECT TO SPECIAL RULES OF ADMISSION AND EVALUATION

EVIDENCE OF INTERESTED PERSONS

Section 79. In General. Determined efforts have been made in international judicial proceedings to obtain the exclusion of the evidence of certain interested persons, especially that of claimants in cases before claims commissions. This is a result of the influence of the old common law rule disqualifying certain persons as witnesses, including the parties, because of their interest, usually pecuniary, in the result of the proceedings, and of the present rules obtaining in the procedure of most civil law countries disqualifying as witnesses the parties, and persons of certain degrees of relationship to them, as well as certain other interested persons.¹

Efforts to induce the exclusion of evidence on the ground of the interest of the witness have come more frequently from counsel and judges accustomed to civil law procedure but have by no means been confined to them.² Counsel for both Great Britain and

¹ The common law rule has been whittled down by statute to one class of persons, namely those disqualified as survivors to testify against an opponent deceased or incapable, and even that disqualification does not obtain in all jurisdictions. I Wigmore's *Evidence* 133, 1025-1026, 1035-1036.

Disqualification for interest and relation still generally obtains, however, in the civil law. Bodington, *op. cit.* 96-98; German Code of Civil Procedure of 1933, Arts. 383, 384. See also Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions," XIX Journ. of Comp. Leg. and Int. Law, 3d series, Pt. I, pp. 100-101; *Salem Claim* (United States v. Egypt), Jan. 20, 1931, *Counter-Case of Egypt*, Dept. of State Arbitration Series No. 4(4) (Washington, 1932), Preliminary observations. Also cf. *supra*, p. 230, note 74.

The new provisions contained in Arts. 445-455 of the German Code of Civil Procedure of 1933, allow the giving of testimony by the parties, but such testimony is only exceptionally given under oath. Art. 393 of the former Code provided that witnesses interested in the result of the litigation should not testify under oath. This is not specifically provided in the new Code. See Art. 391 of the Code of 1933.

The influence of these civil law rules is apparent in the provision contained in Art. 39 of the rules of the German-Czechoslovak Mixed Arbitral Tribunal, exceptional for international tribunals, disqualifying as witnesses "ascendants" or "descendants" of the parties, brothers and sisters, uncles and nephews, and spouses, even though divorced. 1 *Recueil des décisions* 953.

² For example, see *Grannan case* (United States v. Peru), Dec. 4, 1868, Opinion of Commissioner Manuel Pino, ms. *Proceedings and Awards* (1868)

the United States objected strongly to the admission of evidence given by interested parties in the proceedings before the Mixed Claims Commission of 1871, counsel for Great Britain going so far as to contend that the testimony of army officers of the United States be excluded because the United States was a party litigant.³ The United States, acting as defendant before the Spanish Treaty Claims Commission, opposed the admission of evidence given by the claimant on the ground that it was "incompetent and inadmissible."⁴

Unsuccessful efforts have occasionally been made to secure the disqualification of certain witnesses because of interest or relation. In the *Salazar* case before the Brazilian-Peruvian Arbitral Tribunal, the President overruled the objection of Brazil to certain witnesses because of their blood relation to the claimant, adopting the opinion of the Peruvian arbitrator that "in no case is a blood relative prohibited from being witness in the same cause [with relatives]."⁵ The testimony of a geographical expert who was an employee in the British colonial office was likewise taken into account over the objection of Brazil in the British Guiana-Brazilian boundary arbitration on the ground that "the tendencies of his career and of his vocation, in respect to all that might affect the frontier of the colony, brings his judgment under a certain suspicion."⁶ In the *Flutie* case before the United States-Venezuelan Mixed Claims Commission of 1903, Venezuela contested the claim on the ground that the evidence came principally from relatives of the claimants and the claimants themselves, asserting that such evidence "is not admissible even as circumstantial evidence." The Commission made no reference to this contention in its opinion, although analyzing in some detail the contested evidence, apparently agreeing with the view of the United States that relation "goes to the weight of the evidence, and not to its admissibility."⁷

416 ("... it is a principle of universal jurisprudence that nothing is to be believed upon his [the claimant's] word only"); *Landreau Claim* (United States v. Peru), May 21, 1921, *Answer of the Republic of Peru*, (Washington, 1922) 25; *Salem Claim* (United States v. Egypt), Jan. 20, 1931, *Counter-Case of Egypt*, Dept. of State Arbitration Series No. 4(4) (Washington, 1932), Preliminary observations.

³ *Shaver* case, "Brief for the United States on Final Submission," p. 2, *Memorials, Decisions, etc.* (1871), vol. IV, No. 51 (award for \$32, 204); *Alsop* case, "Argument for the United States," p. 2, *ibid.*, vol. V, No. 55 (claim disallowed); *Burton* case, "Brief for the Claimant" (British), p. 1, *ibid.*, vol. XII, No. 174 (award for \$800).

⁴ *Bolton* case, "Memorandum of Defendant in opposition to the introduction in Evidence of certain papers and documents offered by the Claimant," pp. 445-452, *Claimants and Government's Briefs* (1901), vol. 23, No. 37.

⁵ *Introdução e actas* (1916), vol. I, p. 157.

⁶ *Second Mémoire of Brazil* (Paris, 1903) 215. See conflicting views of United States and British counsel in the *St. Croix River Arbitration* on the effect of the special interest in the region in dispute of one of two agents designated by Great Britain to attend the examination of witnesses. *Moore's Adjudications*, vol. 1, p. 69, vol. 2, pp. 207, 237, 299.

⁷ *Morris' Report* (1904) 137, 142; *Ralston's Report* (1904) 38-45.

Section 80. Rule of the British-Mexican Claims Commission of 1926. The question of the treatment to be accorded to evidence given by claimants has probably been given more extensive consideration by the British-Mexican Claims Commission of 1926 than by any other tribunal. The rule applied by the Commission in its proceedings was laid down by the President, Dr. Zimmerman, in the *Mexico City Bombardment Claims* case, after an elaborate argument of the question, and a full statement of the conflicting views of the national Commissioners in separate opinions. Dr. Zimmerman referred to the opinion of the Commission in the *Cameron* case⁸ to the effect that "affidavits contain evidence which can be described as secondary evidence and is often of a very defective character," and that the evidence contained in them must "be weighed with the greatest caution and circumspection, but it would be utterly unreasonable to reject them altogether."⁹ He then stated "for the further guidance of the Agents" that a majority of the Commission (including himself and the Mexican Commissioner) had reached the conclusion "in general, that unsupported affidavits of claimants possess the very defective character of which the quotation [from the *Cameron* case] speaks, and that only in cases of the rarest exception, can they be accepted as sufficient evidence." A further reason for this rule was, he said, that "such documents are sworn without the guarantee of cross examination by the other party; in nearly all cases a false statement will remain without penalty, and, as they are signed by the party most interested in the judgment, they cannot have the value of unbiased and impartial outside evidence."¹⁰

The opposing views of the two Agents are well summarized by the British Commissioner, Sir John Percival, in his dissenting opinion:

"The view propounded by the Mexican Agent is that the statements made by the claimant are merely claims, and not evidence of fact at all, and he relied on the maxim recognized in the domestic law of many countries that no one is witness in his own action. On the other hand the British Agent contended that such statements establish a *prima facie* case and should be accepted by the Commission unless some evidence in rebuttal is produced."¹¹

Sir John declared that he could not "accept entirely either of these theses." On the one hand, he said, the maxim asserted by the Mexican Agent was not universally accepted since in England, the United States and elsewhere "a plaintiff or a defendant is allowed, and indeed, in the case of a plaintiff is expected to give evidence

⁸ See *supra*, sec. 55.

⁹ *Decisions and Opinions*, pp. 100, 102.

¹⁰ *Ibid.* 103.

¹¹ *Ibid.* 109.

like any other witness." On the other, "it is clearly most dangerous to rely upon the uncorroborated statements of a single person, even though they are not rebutted, and this danger is, of course, greater when such person is the claimant himself." Especially in cases of torts or criminal matters, he added, it was almost always impossible to obtain a document attesting the facts, and the victim himself was "clearly the best-informed and often the only person who has a direct knowledge of what occurred." He concluded, therefore, that an allegation of a plaintiff should not be rejected as unproved "merely because its truth depends on his statement alone." In arriving at their decision, the Commissioners "should take into consideration all the circumstances of the affair, the inherent probability or otherwise of the alleged facts and the likelihood of, and opportunity for fraud or exaggeration," and if "acting as reasonable men of the world and bearing in mind the facts of human nature . . . [they] feel convinced that a particular event occurred or state of affairs existed, they should accept such things as established, regardless of the method of proof presented."¹²

Having concurred with the President in holding the unsupported affidavits of claimants to be of a "very defective character" to be accepted as sufficient evidence "only in cases of the rarest exception," the Mexican Commissioner, Mr. Flores, dissented from the conclusion of the majority that in three cases the affidavits of the claimants were not "unsupported" and that "by corroboration the various affidavits and statements" proved "sufficiently the occupation of the Y. M. C. A. Hostel by Felicistas, and the looting by them of the rooms." He asserted that there was not sufficient proof to attach blame to the Mexican Government, saying that the Commission had "laid down the principle that the unsupported statement of the claimants cannot constitute proof of a claim." As there was no proof in this case "other than the claimant's own statement," he declared that the Commission would "appear as acting inconsistently with their own ideas," if a decision should be based upon such statements.¹³

The views of Mr. Flores as to evidence given by claimants and the proper use which may be made of it were more fully set forth in his dissenting opinion in the *Stacpoole* case on the question of damages:

"The statement of the claimant, Mr. Stacpoole, can never be considered, by itself, as sufficient proof of his own claim. Claimant's deposition, called an *affidavit* in Anglo-Saxon technical terms, is the equivalent of what is known as 'confession' in the legislation of all countries of Latin origin. Confession, as an element of proof, is always applied

¹² *Ibid.* 108-109.

¹³ *Ibid.* 115, 117.

against, and never in favour of the person making it. The opposing party generally makes use of that proof to be able to demonstrate, thereby, the fact he wants to submit, in an irrefutable manner, to the consideration of the judge for, evidently, there cannot be stronger proof against the person making it than his own confession. This proof generally relieved the person making use of it, from producing other proofs on the same fact, and thus they say in Law: an admission by the party himself dispenses with proof.

"The difference between confession and testimonial evidence is that the person making it is always one of the contending parties. Testimonial evidence generally emanates from persons who are strangers to the suit."¹⁴

In both the *Stacpoole* case and the *Mexico City Bombardment Claims* case, the Commission, by a unanimous vote in the former case, and a majority in the latter, reached the rather unusual conclusion that the affidavits of the claimants, with some slight corroboration, furnished sufficient evidence to attach blame for the wrongful acts to the Mexican authorities, but that their unsupported statements as to damages could not be accepted. It adopted as a test for determining damages in such cases "the amount representing the value of such objects" as an average person in the position of the claimant might be supposed to have had in his possession.¹⁵

In a number of cases, the Commission applied the rule stated by Dr. Zimmerman. In the *Kelly* case, one of the *Mexico City Bombardment Claims*, the Commission, with the British Commissioner dissenting, disallowed the claim, asserting that the claimant's affidavit "could only be accepted as evidence if it were corroborated by reliable outside statements of one or more persons not interested in the claim."¹⁶ Likewise, in the *Odell* case, the Commission disallowed the claim, saying that "a decision which imposes upon a state a financial liability toward another state cannot rest solely upon the unsupported allegations of the claimant."

¹⁴ *Ibid.* 127, 128.

¹⁵ *Stacpoole* case, *Decisions and Opinions*, p. 126. Six claims were joined in a single memorial and disposed of in the same opinion in the *Mexico City Bombardment Claims* case, based on losses resulting from the looting of the Y. M. C. A. Hostel. Awards of 275 pesos Mexican gold each were made in three of these (Baker, Webb, Woodfin). Poxon's claim was disallowed because there was no corroboration of his affidavit, it having been executed at a different time from those of Messrs. Baker, Webb and Woodfin. *Ibid.* 103, 105. Kelly's claim was disallowed because the single corroborating affidavit was executed fifteen years after the event, the affiant not stating how "the many minute details, . . . came to his knowledge, and no opportunity for interrogation having been given the other party." *Ibid.* 107-108. Tynan's claim was disallowed because he had not signed the Memorial, no statement signed by him was submitted, and the only document containing proof of losses, signed by several people, was unsworn, and the signers not identified. *Ibid.* 106.

¹⁶ *Ibid.* 107.

It found that for the *principal* fact alleged, the derailment of the train of which the claimant was engineer, the only proof was that given by the claimant.¹⁷ Similar grounds were stated in a number of other cases for the dismissal of claims.¹⁸

If the language of the opinions be accepted literally, it must be concluded that the Commission held the evidence of a claimant standing alone to constitute absolutely insufficient grounds for an award. In some instances, however, it went rather far in seeking supporting or corroborating evidence, and in others various factors in addition to the fact of the absence of corroborating evidence appears to have influenced the final decision.¹⁹ In three of the *Mexico City Bombardment Claims*, and in the *Stacpoole* case, having found some corroborating evidence on which to attach responsibility to Mexico, including the *mutual corroboration of the affidavits of the claimants*, the Commission exhibited a willingness to make a guess as to the amount of the damages, though asserting that they could not accept the affidavits of the claimants in this matter.²⁰ Consequently, it appears that the language of the opinions is in some cases broader than the decisions, but in saying this much it is not intended to minimize the effect of the avowed purpose of a majority of the Commission to reject unsupported or uncorroborated affidavits of claimants. Claimants who were unable to corroborate their own evidence had very slight chance of recovery.

Section 81. Cases Attaching Slight Value to Claimant's Evidence. Of all the other decisions in which a rule similar to that adopted by the British Mexican Claims Commissions has been given effect, probably those of Umpire Thornton in the American-Mexican Mixed Claims Commission of 1868 approach closest to

¹⁷ *Further Decisions and Opinions*, pp. 61, 62-63.

¹⁸ *Tracy* case, *Decisions and Opinions*, pp. 118, 121-122; *Lynch* case, *Further Decisions and Opinions*, pp. 101, 103; *Payne* case, *ibid.* 110, 111; *Read* case, *ibid.* 154, 156; *Delamain* case, *ibid.* 222, 224; *Mackenzie and Harvey* case, *ibid.* 277, 278; *Debenture Holders of the New Parral Mines Syndicate and Blunt* case, *ibid.* 281, 286; *D'Etchegoyen* case, *ibid.* 361, 362. See also the *Bartlett* case in which the Commission declined to accept as sufficient corroboration a statement by one witness described as a "very bare statement made without adequate and particularized foundation." *Ibid.* 51, 52.

¹⁹ *Engleheart* case, *ibid.* 65, 66 ("Moreover, the material matters deposed to in the affidavit were not within the personal knowledge of the Deponent"); *Renaud* case, *ibid.* 114, 115-116 (unsupported statement of claimant accepted that he was the person named in the certificate of baptism submitted, having changed his Christian name later in life); *Leigh* case, *ibid.* 80, 83 ("None of the witnesses, who were heard in February at the instance of the Mexican Agent, have given any testimony corroborative of the claim, neither has any trace of the events been found in the archives of the Municipal President of the Military Commander of Pamico").

²⁰ *Mexico City Bombardment Claims* case, *Decisions and Opinions*, pp. 100, 103-105; *Stacpoole* case, *ibid.* 124, 126. Cf. *Fouilloux v. Etat allemand* (Franco-German Mixed Arbitral Tribunal), 3 *Recueil des décisions* 108 (1922), in which in the absence of proof of value the tribunal ordered and accepted the testimony under oath of the claimant as to value.

the strict application accorded to it by that Commission. In a number of cases the Umpire declared flatly, without giving any reasons, that he would not accept the unsupported evidence of the claimant as "a sufficient basis upon which to found a claim and entitle him to compensation."²¹ He did not enforce this rule without qualification, however. In the *Garza* case, which he dismissed for lack of evidence which would have been easy to obtain, he observed that in cases where it has been impossible or even very difficult to obtain evidence, he had "been inclined to overlook its absence and to give credit to a certain extent to the statements of the claimants."²² But if the claimant could have obtained other evidence by reasonable effort, or if his evidence were contradicted by unrefuted evidence presented by the defense, the Umpire did not hesitate to disallow the claim.²³ In a number of cases in which the only evidence submitted consisted of affidavits of other claimants having similar claims, the Umpire declined to make awards, saying that in deciding liability for one he could not have refrained from doing so for all, and that it was therefore undeniable that each claimant was "directly interested in giving such evidence for the other as . . . [would] insure the success of his claim."²⁴ In dismissing the claim in the *Coopwood* case, however, Umpire

²¹ *Kingsbury* case, IV ms. *Opinions* 583; *Guerra* case, VI ms. *Opinions* 356; *Macmanus Brothers* case, IV ms. *Opinions* 180; *da Vega* case, IV ms. *Opinions* 621-622. See also *Groos Blersch and Company* case, VI ms. *Opinions* 479.

"Is the claimant's statement enough upon which to fix the amount? If he has been unable or unwilling to furnish evidence upon this point, it is neither the fault of the government against which he claims, nor of the Commission before which he brings his action. It was the claimant's duty according to law and common sense to state and prove the *quid* of the claim, or in other words to say what he wants, and prove that he is entitled to that.

"When he fails to do this, it would be officious on the part of the judge to do it for him, without knowing, without evidence, and by means of conjectures and surmises, do what it was the duty of the claimant to have done. He might not complain of such officiousness, but the opposite party would have just grounds for complaint, because he would be condemned without proof, and where no preparation had been made by the claimant." *Nolan* case, IV ms. *Opinions*, 438, 442, opinion of Commissioner Zamacoma. Umpire Thornton made an award of \$1,000. VII ms. *Opinions* 411-413.

It is not surprising to find the Umpire refusing to accept the claimant's unsupported evidence as sufficient proof of nationality. *de Leon* case, IV ms. *Opinions* 50; *Suarez* case, VI ms. *Opinions* 416; *Vallejo* case, VI ms. *Opinions* 467, 468; *Shields* case, VII ms. *Opinions* 78, Commissioner Wadsworth for the Commission. For further cases concerning proof of nationality, see secs. 47, 48.

²² VI ms. *Opinions* 514-515.

²³ *Burleson et al.* case, IV ms. *Opinions* 592; *James D. Foster* case, VI ms. *Opinions* 410; *Garay* case, VI ms. *Opinions* 349-350; *Lisner* case, VII ms. *Opinions* 442-443.

²⁴ *Tumlinson* case, VII ms. *Opinions* 606 (Umpire Thornton); *Snider* case, V ms. *Opinions* 262, 265 (Commissioner Zamacoma for the Commission); *Kemm* case, V ms. *Opinions* 289, 292 (Opinion of Commissioner Zamacoma. Claim dismissed by Umpire Thornton, VI ms. *Opinions* 364). See also *Hale* case, IV ms. *Opinions* 62, 69-70 (Opinion of Commissioner Zamacoma. Umpire Thornton made an award of \$20,000, VII ms. *Opinions* 349).

Thornton stated that "in cases where such witnesses are the only ones who can be procured, such evidence might perhaps be admissible."²⁵

In a few other cases the claimant's evidence has been admitted as competent evidence but accorded slight weight, and, in one instance, at least, none at all.²⁶ Umpire Ralston declared in the *Bottara* case before the Italian-Venezuelan Mixed Claims Commission of 1903 that he accepted "as evidence though, naturally, of the lightest character, the letter written by the claimant; it being his duty under the protocols to receive and carefully examine everything presented to him."²⁷ The United States-Panamanian General Claims Commission of 1926, in the *Brown* case, refused "in absence of other evidence and against the denial of the defendant Government" to accept the statements in the affidavit of the claimant as sufficient proof that her alleged contract with the Panamanian Government was consummated.²⁸ In the *Adams* case the Commission dismissed the claim of robbery as unproven, the claimant's affidavit being the only proof, in view "of the variation of his own [the claimant's] estimates as well as the inherent probabilities."²⁹ In the *Gillenwater* and *Hier* cases, before the United States-German Mixed Claims Commission of 1922, the Umpire held that the claimants had failed to discharge the burden of proof resting upon them "to prove pecuniary damages . . . for which Germany was liable under the treaty of Berlin" by submitting in evidence only their own affidavits which bore internal evidences of contradiction, and were contradicted by defense witnesses.³⁰

Section 82. Awards Based on Evidence of Interested Parties. Arguments seeking to restrict or exclude the evidence given by the claimant or other interested parties have been rejected, on the other hand, by a number of tribunals, and awards based directly on such evidence.³¹ The United States-Mexican General Claims

²⁵ VI ms. *Opinions* 522-523.

²⁶ "Considering with regard to the personal claims of Capt. Furman (\$25,000), of Andrew Ronning (\$15,000), and of Neils Wolfgang (\$10,000), for the loss of their property, for their imprisonment, outrages, and privations, that the loss of personal property is not proved *the declarations of the interested parties alone can not be admitted as sufficient evidence.*" [Italics added.] Award of M. Asser, sole arbitrator in the "*C. H. White*" case (United States v. Russia), Sept. 3, 1900, *Whaling and Sealing Claims Against Russia*, 1902 For. Rel., Appendix I, 459, 463.

²⁷ Ralston's Report (1904) 768. There being other evidence in the case in addition to that given by the claimant, he made an award of 6,000 bolivars.

²⁸ Hunt's Report (1934) 92, 94.

²⁹ *Ibid.* 304, 305. See *Samoan Claims* case (United States and Great Britain v. Germany), Nov. 7, 1899, *Case of the United States*, p. 4; *Counter-Case of the United States*, p. 33.

³⁰ Bonyne's Report (1934) 74-76.

³¹ It may be noted here that in some instances claims commissions have required in their rules that the Memorial or Complaint be signed or verified by the claimant. See, for example, United States-Mexican Mixed Claims Commission, July 4, 1868, Rules, Art. 3, III Moore's *Arbitrations* 2153; United

Commission of 1923 based its finding in the *Faulkner* case that the claimant was "detained for several days in a house of detention under intolerable circumstances," upon the uncorroborated affidavit of the claimant.³² In the *Parker* case this Commission held the claimant's nationality to be satisfactorily established by affidavits given by himself, his brother and a friend.³³ It accepted affidavits by the claimant, his mother and his sister in the *Dyches* case as establishing the facts of the date and place of the claimant's birth, saying that the latter were the persons "in the best position to know them through their ties of relationship."³⁴ "No evidence to the contrary having been produced," the Commission accepted the affidavit of the claimant in the *Dillon* case as establishing the fact that he was held incommunicado during his detention.³⁵ In his concurring opinion in this case Commissioner Nielsen declared:

"An arbitral tribunal can not, in my opinion, refuse to consider sworn statements of a claimant, even when contentions are supported solely by his own testimony. It must give such testimony its proper value for or against such contentions. Unimpeached testimony of a person who may be the best informed person regarding transactions and occurrences under consideration can not properly be disregarded because such a person is interested in a case. No principle of domestic or international law would sanction such an arbitrary disregard of evidence."³⁶

States-Spanish Mixed Claims Commission, Feb. 12, 1871, Rules, Art. IV, *ibid.* 2169; United States-French Mixed Claims Commission, Jan. 15, 1880, Rules, Art. X, *ibid.* 2213; United States-Mexican Special Claims Commission, Sept. 10, 1923, Rules, Art. IV(2), *Conventions and Rules. General and Special Claims Commissions United States and Mexico* (Govt. Ptg. Office, 1925); British-Mexican Mixed Claims Commission, Nov. 19, 1926, Rules, Art. 10, *Decisions and Opinions* p. 10.

³² *Opinions* (1927) 86, 90-91. At another point in its opinion, however, the Commission said that it did "not need any theory about presumption of lawfulness of government acts to hold, that in the matter of justification of an arrest the mere statement of the person who suffered the arrest cannot be deemed sufficient." *Ibid.* 88.

³³ *Ibid.* 35, 37.

³⁴ *Opinions* (1929) 193, 195. See also *Corrie* case, *ibid.* 133 (affidavit of claimant "corroborated by affidavits of several of his relatives or acquaintances," and by enlistment record of deceased in United States Navy in which claimant is mentioned as "next of kin of the deceased").

³⁵ *Ibid.* 61, 62. See also *Acosta* case in which claimant's declaration was held to be sufficient proof of presentation of money orders for payment. *Ibid.* 121. But see *Chattin* case in which the uncorroborated affidavits of the claimants were considered in the face of some contradictory evidence not to constitute sufficient evidence of mistreatment in jail. *Opinions* (1927) 422, 433-439.

³⁶ *Opinions* (1929) 63, 65. See also Commissioner Nielsen's discussion of the use of affidavits of interested parties in proof of nationality in the *Russell* case (United States v. Mexico), Sept. 10, 1923, *Opinions of Commissioners, 1926 to 1931*, pp. 43, 49-50. The Presiding Commissioner agreed "in substance" with the conclusions of Commissioner Nielsen, "as regards the fact that the nationality of the claimants and their standing to prefer this claim" had been proven. *Ibid.* 149.

The Tripartite Claims Commission held that a claimant was a competent witness before it and that "his unsupported but un rebutted testimony on a material fact *prima facie* established that fact."³⁷ In the case of the "*Montijo*," in response to the allegation of the Colombian arbitrator that the affidavits of the parties interested in the claim were "*pro tanto* invalid," the Umpire declared that "although independent testimony of any fact is always desirable, there are many cases in which it cannot be procured," and added:

"But this is no reason for excluding the evidence of eye witnesses of and participators in a transaction on the ground that they may be interested, pecuniarily or otherwise, in its solution. To render such testimony invalid it would be necessary to prove a notorious absence of credibility in the witnesses, or a manifest combination or conspiracy on their part to swear falsely."³⁸

The testimony of interested parties was likewise accepted in the case of "*The Lottie May*," and in the United States-German Mixed Claims Commission of 1922, in the latter instance awards being based in some cases solely on the evidence of such parties.³⁹

Section 83. Interrogation of Claimants. In civil law procedure a substitute of limited applicability for testimony by the parties consists of what is called in French law the decisory oath (*serment decisoire*). If the facts are peculiarly within the knowledge of the parties, one party may offer to renounce his claim if the other will swear under oath to the truth of the facts on which he bases his claim. If the party takes the oath, judgment is automatically rendered in his favor. If he refuses, judgment goes to

³⁷ *Kapp* case, Parker's Report (1933) 70-71. The Commission added this qualification: "But where the Agent of either respondent Government is not satisfied with the claimant's testimony in any particular case or wishes to test the source or accuracy of the information upon which such testimony is based, or the credibility of the witness, or requires a disclosure of other material facts within the claimant's knowledge, such Agent under such circumstances will be accorded the privilege of propounding interrogatories to the claimant to be forwarded by the American Agent to be answered under oath by the claimant and thereupon returned to this Commission and filed as evidence in the case in question."

³⁸ *United States v. Colombia*, Aug. 17, 1874, II Moore's *Arbitrations* 1434-1435. For opinion of the Colombian Arbitrator, see Minister Scruggs to Secretary of State Fish, No. 115, Aug. 13, 1875, enclosure No. 3, ms. National Archives of United States, 30 Despatches, Colombia.

³⁹ *Great Britain v. Honduras*, March 20, 1899, *Incidente "Lottie May"* *Arbitramento entre la República de Honduras y la Gran Bretaña* (Tegucigalpa, 1899) 106; J. Wilhelm Kiesselbach, *Problems of the German-American Claims Commission* (Washington, 1930) 12. Dr. Kiesselbach was the German Commissioner. See also *Sprotto* case (*United States v. Mexico*), July 4, 1868, II ms. *Opinions* 269-275, 281-291; *Salem Claim* (*United States v. Egypt*), Jan. 20, 1931, *Award of the Arbitral Tribunal. Dissenting Opinion of Hon. Fred K. Nielsen*, Dept. of State, Arbitration Series No. 4 (6) (Washington, 1933) 107-108.

the party making the offer. The party to whom the oath is offered may tender it back to the other party, with like consequences attaching to taking or refusing to take it. It is obvious that this procedure involves great risk for both parties and has quite limited usefulness.⁴⁰ However, provision was made for the use of such an oath in the rules of a number of the Mixed Arbitral Tribunals.⁴¹

In Anglo-American procedure the parties, including the plaintiff, not only have the right to testify, but they also have before the trial a right of discovery of facts peculiarly within the knowledge of the opposing party. The methods vary in modern American procedure, including written interrogatories, either annexed to the pleadings or filed separately, oral examination pursuant to the order of the court, or oral examination by way of deposition taken in the same form as the deposition of other witnesses in advance of trial. In England discovery is accomplished by interrogatory separate from the pleading, the answer being given by affidavit. French procedure provides for discovery both by interrogatory and examination on personal appearance (*comparution personnelle*), the latter being preferred. This right of discovery is a very valuable one, as it enables a party at an early stage in the proceedings to obtain proof of vital facts from the person frequently best qualified to produce such proof, namely, his opponent.⁴²

As already pointed out, parties to international proceedings have a general right of discovery with respect to documents in the sole possession of the opposing party.⁴³ The device of interrogating the opposing party would seem to be applicable in such proceedings only in the case of claims commissions, and then only with respect to the claimant. Governments as parties are hardly

⁴⁰ Colin and Capitant, *op. cit.*, vol. II, pp. 463-466.

The decisory oath was discarded in German procedure in the Code of Civil Procedure of 1933, and, in its place, testimony of the parties allowed, with the right reserved to the court to have the party swear to the truth of his statements. Concerning the same fact, only one party can be sworn in, even though both have testified. See Arts. 445-455. See also Robert Wyness Millar, "The Mechanism of Fact Discovery: A Study in Comparative Civil Procedure," 32 Ill. L.R. 428 (1937).

⁴¹ German-Belgian, Art. 53, 1 *Recueil des décisions* 40; Austrian-Belgian, Art. 53, *ibid.* 178; German-Serb-Croat-Slovene, Art. 43, *ibid.* 272; German-Czechoslovak, Art. 42, *ibid.* 954.

The Anglo-German Rules contained the following somewhat unusual provision in Art. 36: "If at any stage of the proceedings a party requires to prove any specific fact it shall be open to the party to give a notice to the other party to admit or dispute such fact. If the party to whom notice is so given disputes the fact, and such fact is subsequently established, the Tribunal may in its discretion order the party who had disputed such fact to pay the costs of proof and any other costs occasioned thereby . . ." *Ibid.* 117.

⁴² III Wigmore's *Evidence* 930-933, 955-956; Millar, *op. cit.* 448, 445, 282-283, 428. See also Buckland and McNair, *op. cit.* 321.

⁴³ See *supra*, sec. 22. Also cf. *supra*, pp. 127-128, for discussion of the taking of the testimony of President John Adams in the *St. Croix River Arbitration* between the United States and Gt. Britain.

subject to interrogation, although the officials of the government may be called as witnesses by either party, or may be required to produce evidence in their care or custody.⁴⁴ Provision has only rarely been made for the interrogation of the claimant in proceedings before claims commissions.⁴⁵ It would seem that this is a device that might be more frequently used with great benefit, both for the elucidation of the facts and for giving the Commission a better opportunity to determine the credibility of the claimant. If a claimant is to be permitted to give evidence in support of his own claim, he should certainly be subject to interrogation by the opposing party, either through interrogatories, or by direct examination before the commission, or before a member of the tribunal delegated for the purpose. It should not, of course, be used to the exclusion of other evidence given by the claimant in the form of depositions or affidavits.

⁴⁴ Mr. Nielsen points out in a memorandum dated April 24, 1934, printed in his report on the *Turkish Claims Settlement*, that "accurately speaking claimants are not parties in international practice; . . . the Governments are parties." Nielsen's Report (1937) 65.

Feller says that in three cases before the Italian-Mexican Commission of 1927, "the Italian Agent, being unable to present proof with the Memorial, asked the Commission to permit him to interrogate the Mexican Agent with respect to the facts," relying on a Mexican procedure known as "*poner posiciones*" or "*diferir el juramento*." The Commission held that as this procedure was applicable only to a defendant who had personal knowledge of the facts, it was not admissible in a procedure where governments were litigants. *Gebbia* case, *Osti y Hermanos* case, and *Spada* case (unpublished). *Mexican Commissions*, p. 267.

⁴⁵ "V. The Arbitrators may, in their discretion, order any claimant to answer on oath such interrogatories as may be submitted to the Commission for the purpose, by or on behalf of either Government." United States-Spanish Mixed Claims Commission, Feb. 12, 1871, Rules of Procedure, III Moore's *Arbitrations* 2170.

"30. The Claimant may be called upon to appear on request of the Agents or in the discretion of the Commission, and he shall in that event be examined in accordance with the procedure referred to in the preceding paragraph." British-Mexican Claims Commission, Nov. 19, 1926, Rules of Procedure, *Decisions and Opinions*, p. 14. Similar provision was made in the rules of the following Mexican Commissions: French-Mexican, Sept. 25, 1924, Rules, Art. 33, *Règlement de procédure* (1925); German-Mexican, March 16, 1925, Rules, Art. 33, *Convención de reclamaciones*, etc. (1926); Spanish-Mexican, Nov. 25, 1925, Rules, Art. 37, *Reglas de procedimiento* (1927).

In the *Cervetti* case before the Italian-Venezuelan Mixed Claims Commission of 1903, the claimant was "summoned before the Commission and examined by its members under oath." Ralston's Report (1904) 662.

The lack of uniformity in the rules of the Mixed Arbitral Tribunals is interesting in this respect. The Anglo-German rules provided, for example, that the parties should have the right to give evidence "provided always that a party to a case shall not be summoned or compelled to give evidence unless the Tribunal shall have given leave for such witness to be summoned or to give evidence or unless the Tribunal shall have required of its own motion that such party shall attend and give evidence." (Art. 31 (a), 1 *Recueil des décisions* 116). The Franco-German rules provided on the other hand, that the "tribunal might exceptionally hear the parties." (Art. 56, *ibid.* 52). Others contained a provision similar to the following from the German-Belgian Rules: "Le Tribunal peut exiger la comparution, distincte ou simultanée des parties en personne." *Ibid.* 40.

Section 84. Conclusions. The question what weight if any shall be attributed to evidence given by claimants and other interested persons is not free from difficulty. Granting its readiness to admit and consider such evidence, a tribunal not infrequently finds itself in a dilemma in this respect—no other evidence is available, yet not having the witness before it, it has a very limited opportunity for testing his credibility and weighing the truth of what he asserts. There is undoubtedly need of proceeding with very great caution in basing an award upon the testimony of interested parties, especially the claimants, and especially where, as is frequently the case, the evidence is in the form of affidavits, the witness never having been confronted by anyone or anything save his own counsel and his conscience. The risk of doing an injustice to the defending party by relying upon such testimony, however, hardly warrants non-suiting the plaintiff for not presenting evidence which can not be had. The harsh rule of the British-Mexican Commission which denies recovery to one party without a hearing in order to avoid risk of doing injustice to the other hardly offers a sound solution of the problem.⁴⁶

A rule excluding or denying any weight to the testimony of interested parties may have some justification in municipal procedure where other evidence will usually be available, although as pointed out by Wigmore its absolute exclusion appears to be based upon a premise of very doubtful validity.⁴⁷ In international procedure where the claimant through no fault of his own so frequently has no evidence except his own or that of parties intimately interested in the case upon which to base a claim for redress, such a rule is surely inequitable and unsound. A much more desirable procedure would seem to be that of "examining the proofs and the documents that may be presented not failing in proceeding to decide the claims to analyze such proofs assigning them more or less weight according to the manner in which they have been produced, the veracity of each witness, his interest

⁴⁶ See Feller, *Mexican Commissions*, p. 269.

⁴⁷ "The theory of disqualification by interest was merely one variety of the general theory which underlay the extensive rules of incompetency at common law. It was reducible in essence to a syllogism, both premises of which, though they may now seem fallacious enough, were in the 1700's accepted as axioms of truth: Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; Persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; Therefore such persons should be totally excluded. . . . The answer to this syllogism is merely that both its premises are unsound,—that pecuniary interest does not raise any large probability of falsehood, and that, even if it did, the risks of false decisions are not best avoided by excluding such testimony." I Wigmore's *Evidence* 996-997.

in the question, his relations with the claimant, and in short according to all the circumstances of the case."⁴⁸

Commissioner Nielsen observed in his opinion in the *Dillon* case that "unimpeached testimony of a person who may be the best informed regarding transactions and occurrences under consideration can not properly be disregarded because such a person is interested in a case."⁴⁹ Fundamentally there is no better reason for refusing to trust to the sound discretion of the tribunal in weighing such evidence than in the case of the multifarious evidence of other kinds indiscriminately submitted to it for evaluation under the existing liberal practice in the admission of evidence. Tribunals should take advantage of "the light of truth, dim as it may be, that may shine out of" the affidavits of claimants and of parties in interest, as well as out of the affidavits of other witnesses.⁵⁰ To exclude such affidavits from tribunals, invoking again the language of the British-Mexican Commission in the *Cameron* case, "would mean that their task would be attended by greater difficulties . . . and that the position of one party to the convention would be seriously prejudiced."⁵¹

The use of such evidence should be strictly limited to cases in which there is a satisfactory showing that no other evidence is available. Such a showing having been made, the evaluation of evidence given by the claimant and other interested parties may properly be left to the tribunal.

HEARSAY EVIDENCE

Section 85. In General. The question of the admission and evaluation of hearsay evidence in the strictly technical sense of that term in Anglo-American law does not appear to have been discussed in the adjudicated international cases. Civil law procedure, generally speaking, contains no rules relating to hearsay evidence. Witnesses are permitted to testify freely, the evidential value of the testimony to be determined by the judge. The essence

⁴⁸ *Hill* case (United States v. Peru), Dec. 4, 1868, ms. *Proceedings and Awards* (1868) 367, 371, opinion of Commissioner Cisneros.

Commissioner Vidal declared in his opinion in the same case:

"The Agent of Peru, not having on his part any proofs tries to destroy the value of those of the claimants. In the first place he says that Eggart being himself consequently is not worthy of faith. To whom ought Hill to apply in order to obtain proofs? to his assassins, to robbers? to those who tortured and insulted him? Evidently not. Ought he to apply to persons utterly different, who were terror struck, and who would have feared, by appearing to defend the victims, to draw the vengeance of the populace on their own heads? It is quite evident that he would not have succeeded. He applies therefore to those who like himself have suffered; who have been witnesses of his misfortunes." *Ibid.* 353, 357.

⁴⁹ *Opinions* (1929) 65.

⁵⁰ *Cameron* case (Great Britain v. Mexico), Nov. 19, 1926, *Decisions and Opinions*, pp. 33, 36.

⁵¹ *Ibid.* 36.

of the Anglo-American rule excluding hearsay testimony is that the court will not "credit any man's assertion" unless it can be tested by bringing him into court and cross-examining him. The element of personal knowledge or observation, which is the sense in which the term hearsay is popularly used, enters into the technical hearsay rule but is merely incidental. It is not the fact that the witness does not speak of his own personal knowledge or observation that is decisive, but that the person whose statements the witness reports having been made to him cannot be brought into court and cross-examined.⁵²

However, upon the general principle of personal knowledge, the testimony of a person is rejected, in general, in Anglo-American law, if he speaks other than from personal observation of the facts or events to which he testifies.⁵³ It is only in this sense that international tribunals could, as a rule, be interested in "hearsay" evidence, since evidence is generally submitted in written form in international procedure. The witnesses consequently could not, in any event, be subjected to cross examination, except to the extent that cross examination is permitted in the taking of depositions. In those opinions in which "hearsay" evidence has been given consideration, the term has been loosely used, there being apparently no intention to apply the technical hearsay rule as such. Reference has been had generally, if not universally, to the admission or evaluation of evidence not based on personal knowledge or observation, and it is only on that basis on which the matter has been considered.

Section 86. Reception in International Proceedings. Generally speaking, there are no rules in international judicial procedure against the admission of hearsay evidence, that is, evidence not based on personal observation.⁵⁴ There is no sound reason for its exclusion as the commonly accepted reason for the exclusion of such evidence, namely, "the necessity of guarding the members of the jury from their own inexperience in distinguishing the probative value of evidence," does not obtain in proceedings before international tribunals.⁵⁵

⁵² III Wigmore's *Evidence* 2-7, 26-29, 156-157. Necessity and inherent circumstantial guarantee of trustworthiness are the basic principles underlying the exceptions to the hearsay rule. *Ibid.* 155-156.

See also McCormick, "Evidence," V *Encyclopedia of Social Sciences*, *op. cit.* 641-642.

⁵³ I Wigmore's *Evidence* 1058-1060.

"This objection to testimony, however, must be distinguished from the objection based on the so-called Hearsay rule." *Ibid.* 1060.

⁵⁴ For a rather extensive argument to the effect that the common law rule excluding hearsay evidence cannot be invoked in international proceedings, see the *Final Argument of the United States in the Shufeldt Claim* (United States v. Guatemala), Nov. 2, 1929, Dept. of State, Arbitration Series, No. 3, (Washington, 1932) 707-710.

⁵⁵ A. H. Feller, "Modern Civil Law," V *Encyclopedia of the Social Sciences*, *op. cit.* 646; III Wigmore's *Evidence* 9-25. Cf. *supra*, sec. 3.

In implicit recognition of the foregoing principles questions raised concerning hearsay evidence before international tribunals have been directed, in the main, to its value rather than to its admission. However, in some cases tribunals have refused to base awards on the second hand statements of witnesses who had no opportunity to observe the events concerning which they testified. It is not always clear in these cases whether the refusal to accept the evidence as sufficient is based on its hearsay character as such, or whether the tribunal was influenced also by the intrinsic improbability or uncertainty of the testimony.⁵⁶ Chief among these cases are the decisions of Umpire Thornton in the United States-Mexican Mixed Claims Commission of 1868, who treated hearsay evidence in much the same fashion as he did that given by claimants and other interested parties.⁵⁷ Ralston says that "before the Venezuelan Commission of 1903 hearsay evidence was repeatedly offered and as certainly rejected, or at least ignored," but adds that such instances generally occurred in cases not reported, and cites only two cases, both from his own decisions in the Italian-Venezuelan Mixed Claims Commission of 1903.⁵⁸ In his dissenting opinion in the case of *Fendall et al.* before the Domestic Commission under

⁵⁶ In *Pomeroy's El Paso Transfer Co.* case, the evidence consisted principally of the affidavits of the president of the company (Murchison), and of one eye witness. With respect to the former the Commission said that Murchison lacked the "qualities of . . . a qualified witness," adding that, although as president of the corporation he was to be presumed to be acquainted with its affairs, the knowledge that he had of events before he assumed office was "second hand." As to the second witness, it was stated that his affidavit merely corroborated that of Murchison, and that although such a confirmatory statement had some value it was "unquestionably true that in order to form a definite opinion each witness must set forth in his own manner the things he saw or knew since the comparison of different statements throws a light upon the facts equivalent to a confrontation of witnesses." The claim was dismissed, Commissioner Nielsen dissenting. *Opinions* (1931) 1, 4-5, 7.

⁵⁷ *Costanza* case, IV ms. *Opinions* 601-602; *Cramer* case, *ibid.*, vol. VI, p. 501; *Evans* case, *ibid.*, vol. VII, p. 340; *Frazier* case, *ibid.*, vol. VI, pp. 422-423; *Landnum* case, *ibid.*, vol. VI, p. 371; *Lewis* case, *ibid.*, vol. VI, p. 378; *Wheeler* case, *ibid.*, vol. VI, pp. 428-429. See also *Koney* case, *ibid.*, vol. V, p. 411. (Commissioner Wadsworth for the Commission.) The Commission also declined to accept hearsay evidence as proof of citizenship. *Amador* case, *ibid.*, vol. VI, p. 305. (Opinion of Commissioner Wadsworth. Umpire Thornton dismissed the claim. *Ibid.*, vol. VI, p. 354.) *Arce* case, *ibid.*, vol. VI, p. 304 (Opinion of Commissioner Wadsworth. Umpire Thornton dismissed the claim, *ibid.*, vol. VI, p. 354); *Fauchong* case, *ibid.*, vol. VII, pp. 453-454. (Umpire Thornton). Concerning proof of citizenship, see also *supra*, secs. 47, 48.

⁵⁸ *Law and Procedure* (1926) 216; *Cervetti* case, Ralston's Report (1904) 662-663; *De Zeo* case, *ibid.* 693, 694.

"The objection by the Commissioner for Venezuela that two of the witnesses testify from notoriety and not from personal knowledge is not supported by the proof as to all the matters testified to by them while it is warranted as to certain matters. If they were the only witnesses there would be force in the objection to the extent that their testimony is based upon notoriety or hearsay." *Richter* case (Germany v. Venezuela), Feb. 13, 1903, *ibid.* 575, 576.

the Act of March 2, 1827, Commissioner Cheves declared inadmissible "the hearsay testimony as well of the white as the coloured" witnesses.⁵⁹

The tribunal is free, in the exercise of its general powers in this respect, to attach such weight to hearsay evidence, once admitted, as it deems proper under all the circumstances of the case. In some instances tribunals have taken occasion to assert that evidence not based on personal observation carries very limited weight, standing alone, as proof of the facts asserted.⁶⁰

Section 87. Maps as "Hearsay."⁶¹ Reference has previously been made to the "hearsay" character of a great many of the maps introduced in evidence in boundary arbitrations in proof of contested geographical and political facts.⁶² It is necessary only to reiterate here that maps furnish an especially forceful illustration of the dangers inherent in the use of hearsay evidence. As to geographic facts, maps are hearsay evidence unless they are based upon an original survey of the natural features depicted by the map. As to political facts, they are hearsay in character unless the line portraying the boundary on the map was drawn or officially adopted by the officials responsible for the negotiation and definition of the boundary, or unless the map was prepared by an individual or commission designated to survey and chart the line.

So far as the question of the extent of the sovereignty of any given state is concerned, therefore, maps are, in a very great majority of cases, hearsay or secondary in character. They can seldom be based on information obtained by personal observation or participation in the definition and delimitation of the boundary. They are at best, in most instances, a portrayal in graphic form of facts contained in the official sources upon which they are based. In consequence, their value depends peculiarly upon the integrity and accuracy with which the cartographer portrays the facts as set

⁵⁹ Ms. *Opinions*, National Archives of United States. See also opinions of Commissioners Pleasants and Seawell. The latter declared that "a fair interpretation of the terms of the Convention, requiring the commissioners to decide the cases according to their merits; leaving to them to [weigh?] as they should think fit, the nature and character of the evidence, requiring the board to examine all persons who should come before them, taken in connexion with the volume of the facts to be proven, place without doubt, in my mind, the admissibility of the hearsay evidence as to Gt. Britain." Cf. *supra*, pp. 124-125.

⁶⁰ *Walfisch Bay Boundary Arbitration* (Germany v. Great Britain), Jan. 30, 1909, 104 Br. and For. St. Paps. 50, 76-95. (Award of Don Joaquin Fernandez Prida, sole arbitrator, May 23, 1911); *da Silva Paula* case (Brazil v. Bolivia), March 21, 1903, *Introdução e actas* (1911), vol. I, p. 95; *Garate* case (United States v. Mexico), July 4, 1868, V ms. *Opinions* 570 (Opinion of Commissioner Zamacoma. Claim dismissed by Umpire Thornton, *ibid.*, vol. VI, p. 422). See also argument of Sir Edward Carson during the oral proceedings in the Alaskan Boundary Arbitration (United States v. Great Britain), Jan. 24, 1903, *Proceedings* (1904), vol. VII, p. 641.

⁶¹ Cf. *supra*, sec. 49, for a discussion of maps in relation to the "best" evidence rule.

⁶² See *supra*, sec. 49.

forth in the sources from which he draws his information. The possibility of error is enhanced by the fact that the cartographer must combine a high degree of geographic skill with an unusual competence in deciphering political documents. Such a combination, it is superfluous to state, is rare. Maps purporting to portray a boundary must always be tested both from the point of view of the accuracy and authenticity of the sources used; and from the point of view of the technical accuracy of the cartographer. The application of these tests is difficult as the sources may be known only partially, or may be in controversy, and the cartographer himself is seldom available for direct examination. This admonition from the argument of Great Britain in the British Guiana-Brazilian Boundary Arbitration is, therefore, particularly appropriate:

"Those maps which may seem to indicate a boundary are, in a manner, a class by themselves . . . as has been stated over and over again in this case, none of them can carry authority apart from the name of the geographer, unless something is known of the reasons for which they were drawn, or unless they appear to conform to some geographical principle or historical fact. The mere existence of a line which is against historical principle or historical fact can carry no weight, whatever may be the authority of the map on other grounds."⁶³

With reference to geographic features, maps are frequently copies from other maps, or based upon geographic treatises describing the territory portrayed by the maps.⁶⁴ The limited value

⁶³ *The Argument on Behalf of the Government of His Britannic Majesty* (London, 1904) 89.

"If a map is to be considered as an expression of the opinion of the author relative to the geographical situation or political status of territory, extreme caution is called for in accepting such opinion as authoritative, especially when it comes to determining questions of territorial rights. Often purely arbitrary lines are drawn and colours used on maps, which cannot be said to represent any considered opinion. Many maps have been copied from one another during long periods without any testing of their accuracy. And maps which have no other purpose than to give some general idea of the geography of a certain part of the world, often are very incorrect with regard to details. The value to be attached to cartographical material will very much depend upon the character of each particular dispute." *Palmas Island case* (United States v. Netherlands), Jan. 23, 1925, *Counter-Memorandum of the Netherlands Government* (The Hague, 1926) 61.

During the proceedings in the Alaskan Boundary Arbitration, Sir Robert Finlay quoted the following passage from Greenhow's *History of Oregon and California*: "These discrepancies should not excite surprise, for maps and books of geography, which are most frequently consulted in relation to boundaries, are, or rather have been, the very worst authorities on such subjects; as they are ordinarily made by persons wholly unacquainted with political affairs." *Proceedings* (1904), vol. VI, p. 316.

⁶⁴ "The habit of geographers of copying one another is the cause of additional difficulties presented when examining cartographical evidence; the lack of system in the choice of maps for copying adds another. Atlases fre-

of such maps, and the dangers lurking in reliance upon them are obvious. As evidence upon which to base an award in which the demarcation of the boundary is dependent upon the location and character of topographical features, they are generally worth next to nothing. "The maps in which ancient conceptions of mountain ranges are applied to unexplored countries," asserted the Tribunal appointed by the arbitrator, Queen Victoria, to consider and report upon the frontier between Argentina and Chile, "have not the least importance in the tracing of a boundary according to treaties that have not those maps in view."⁶⁵ Such maps may have some value as showing an ancient conception of the location or name of a given feature, or as showing a consensus of contemporary opinion concerning a controverted point, but on any question requiring accurate geographical knowledge, they constitute hearsay evidence of the most doubtful sort.⁶⁶ Thus, the United States Supreme Court declared in its opinion in *Missouri v. Kentucky* concerning the maps of early explorers and the reports of travellers concerning the course of the channel of the Mississippi River:

"The answer to this is, that evidence of this character is mere hearsay as to facts within the memory of witnesses, and if this consideration does not exclude all books and maps since 1800 it certainly renders them of little value in the determination of the question in dispute. If such evidence differs from that of living witnesses, based on facts, the latter is to be preferred."⁶⁷

In former times because of the frequent lack of accurate geographical knowledge, such secondary maps were at times relied upon as a matter of necessity, but there can be little excuse for resort to evidence of this character with the rapid extension of geographical knowledge in recent years and the development of the science of cartography.⁶⁸ "Hearsay" maps should no longer be accepted except in proof of ancient or contemporary facts for which no other better evidence is available.

Section 88. Privileged Evidence. Evidence of Confidential Character. The general obligation resting upon every individual under municipal law to give whatever testimony is in his possession obtains with equal force in international judicial procedure,

quently contain different maps of the same territory giving absolutely different representations in that which concerns the demarcation of boundaries." *British Guiana-Brazilian Boundary Arbitration, Second Mémoire de la droit du Brazil* (Paris, 1903) 5, quoting passage from *British Memorial*, pp. 155-156.

⁶⁵ Report presented to the tribunal appointed by Her Britannic Majesty's Government, etc. (London, 1900), vol. II, p. 556.

⁶⁶ See *supra*, pp. 161-164.

⁶⁷ 11 Wallace 395, 410 (1870).

⁶⁸ See Charles Cheney Hyde, "Maps as evidence in international boundary disputes," 27 A.J.I.L. 311-316 (1933).

although as previously noted, the procedural devices for compelling the giving of such testimony are sometimes defective.⁶⁹ The reason in social necessity underlying that rule has been forcefully stated by Wigmore:

"The whole life of the community, the regularity and continuity of its relations, depend upon the coming of the witness. Whether the achievements of the past shall be preserved, the energy of the present kept alive, and the ambitions of the future be realized, depends upon whether the daily business of regulating rights and redressing wrongs shall continue without a moment's abatement, or shall suffer a fatal cessation. . . . The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in the present cause, but to the community at large and forever."⁷⁰

In international as in municipal procedure, therefore, any privilege permitting a witness to refuse to give testimony must be based upon compelling reasons of necessity or policy.

There are two general rules of privilege in municipal procedure having apparent potential importance in international proceedings, namely, the exemption of certain professional persons from revealing information confided to them in their professional capacity, and the privilege for facts constituting secrets of state. In French procedure the privilege of not disclosing professional secrets is extensive including attorneys, physicians, surgeons, druggists, midwives, and, in fact, all persons who are the confidants of secrets entrusted to them by reason of their occupation or profession.⁷¹ Such persons are not only exempt from testifying as to such secrets but are, in fact, punishable if they do.⁷² A minister of justice can never be cited as a witness, except when his examination is especially authorized by an order of the Government. His testimony is reduced to writing and received by the first president of the Court of Appeal. The testimony of other ministers, and of councillors of State, Ambassadors, diplomatic agents, or generals in chief in service can only be taken in accordance with special rules laid down in Articles 514 to 517 of the Code of Criminal Procedure, which require that the testimony be reduced to a deposition except in cases where it is to be taken at their place of residence. It is then sent under seal to the Court requiring it.⁷³

⁶⁹ See *supra*, sec. 69.

⁷⁰ IV Wigmore's *Evidence* 651.

⁷¹ Bodington, *op. cit.* 99-100.

⁷² *Code pénal*, annoté, etc., par M. Henry Bordeaux, trente-quatrième ed. (Paris, 1936), Art. 378, pp. 172-174.

⁷³ *Code d'instruction criminelle*, annoté, etc., par M. Henry Bordeaux, trente-quatrième ed. (Paris, 1936) 259-261. For comparable provisions in German law concerning the exemption from testifying of public officials, of persons related to the parties, and of persons to whom information had been confided in their professional capacity, see Arts. 376-390 of the 1933 Code of Civil Procedure.

In American procedure the privilege of professional secrecy extends principally to communications between attorney and client, physician and patient, priest and penitent, and communications among petit and grand jurors.⁷⁴ It is purely a personal privilege, in the three former instances, and the information may, and in fact, must be given if the client or patient or penitent consents. Wigmore says that the scope of the privilege of public officers from disclosing certain kinds of facts or communications received through their official duties has not been clearly defined, but that aside from those relating to diplomatic and military matters it is very limited. The necessity for secrecy in any case with reference to state secrets is a matter for determination by the Court.⁷⁵

Generally speaking the privilege of exemption from giving testimony arising from the professional relation could only arise in international procedure in cases before claims commissions. Neither this privilege nor that concerning state secrets appears to have arisen before international tribunals in a manner requiring formal consideration in the opinions of such tribunals except in certain instances in proceedings before the Permanent Court of International Justice.⁷⁶

At the time of the original adoption of Article 50 [Article 53, 1936 Rules] of the Rules of the Court requiring each witness to make a prescribed solemn declaration before giving his evidence in Court, it was agreed that the making of such declaration should not compel a witness to violate professional secrecy.⁷⁷ In the report of the Second Committee made during the course of the preparation of the 1936 Rules, consideration was given, with

⁷⁴ V Wigmore's *Evidence* 10-82, 103-159, 201-233. Certain communications between husband and wife are also privileged. *Ibid.* 83-102.

"Four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation:

(1) The communications must originate in a *confidence* that they will not be disclosed;

(2) This element of *confidentiality* must be *essential* to the full and satisfactory maintenance of the relation between the parties;

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation." *Ibid.* 1-2.

⁷⁵ *Ibid.* 186-200.

⁷⁶ See, however, a statement by the Agent of the United States in offering to hand to the arbitrator a confidential document to which reference had been made during the oral arguments in the *Kronprins Gustav Adolf* and the *Pacific* case (United States v. Sweden), Dec. 17, 1930, to the effect that "it would be undesirable . . . to have it go in the public record of the case," and that it should be for the arbitrator's "information only." The arbitrator stated that he thought he had sufficient information without it. *Oral Arguments*, Dept. of State, Arbitration Series No. 5(5), (Washington, 1934), vol. I, p. 302.

⁷⁷ Series E, No. 3, p. 212; Series D, No. 2 (add.) 132.

reference to Article 40 of the existing rules [Article 43, 1936 Rules], to the question whether a positive provision should be included requiring "a party to produce all the relevant information in its possession."⁷⁸ The Committee thought it would be wise to say nothing in the Rules about such a duty as there were "great difficulties in the way because in its own courts every government must claim to exercise occasionally the right to refuse to produce a document on the ground of public interest and of that interest it claims to be the sole judge."⁷⁹

The question of the propriety of admitting copies of confidential records not available to all parties to the proceedings has been considered by the Court in several instances, with formal rulings in the matter in two cases. During the proceedings in the case concerning the *Jurisdiction of the European Commission of the Danube*, the Roumanian Government sought to invoke in support of its contentions the records of the preparation of certain articles of the Treaty of Versailles. Objection having been made by one of the other governments appearing in the case to the use of these records as evidence on the ground of their secret character, the Court reserved its decision on the matter, pending a reply to a letter from the Registrar to the French Minister for Foreign Affairs requesting him to have the citations made verified, and asked his views on the admission of the records in evidence. In its opinion delivered before the receipt of an answer, the Court declared that as the records were confidential and had not been placed before "it by or with the consent of, the competent authority," it was "not called upon to consider to what extent it might have been possible for it to take this preparatory work into account."⁸⁰

In the proceedings in the case concerning the *Jurisdiction of the Oder Commission*, objection having been made by the Six Governments to the introduction by Poland in her Memorial and Coun-

⁷⁸ For text, see appendix III.

⁷⁹ Series D, No. 2 (3d add.), pp. 768-769.

⁸⁰ Series B, No. 14, p. 32. The record of the proceedings in this case raises some doubt as to whether the records in question were ever properly produced before the Court. They were produced for the first time in the oral argument by counsel for the Roumanian Government, and then apparently without notice to the other party, although the Roumanian Agent in a letter of September 27, 1927, in response to an inquiry from the Registrar, had specified the records as documents which the Roumanian Government intended to produce. Counsel for Great Britain objected to the use of the documents on the ground that they were confidential, while Roumanian counsel denied their confidential character. Duly certified copies of the disputed records were only submitted to the Registrar by the Roumanian Agent after the close of the oral argument. From the foregoing facts it appears that acting under Article 52 of its Statute and Article 47 of its Rules, the Court might have held that it was not called upon to consider the documents on the grounds that they were not properly before it. See Series C, No. 13, pp. 186, 277-278, 305, 2151, 2155, 2170, 2172, 2188-2189, 2190-2191.

It should be noted, however, that the Court has been reluctant to take such action. See *supra*, sec. 17.

ter-Memorial of certain passages from the preparatory work of the Committee on Ports, Waterways and Railways of the Paris Peace Conference, the Court called for oral argument on the question. The Six Powers contended that the challenged passages should be excluded, both on the ground that they were confidential and on the ground that certain of the parties to the suit not having participated in the Conference had no official knowledge of the records. Poland agreed to withdraw the confidential records, but insisted on the right to refer to and cite published records of the Conference.⁸¹ In an order of August 20, 1929, the Court ruled that the Minutes of the Committee should be excluded as evidence. It declared that "in any particular case, no account can be taken of evidence which is not admissible in respect of certain Parties to that case," and that this consideration applied "with equal force in regard to the passages previously published . . . and to the passages now reproduced for the first time . . ." ⁸² Therefore, the Court's decision appears to have been based not on the confidential character of the documents as such, but on the fact that since their confidential character made them inaccessible to certain of the states parties to the proceedings, the Court could not properly take them into account in reaching a judgment.

In connection with the proceedings in the cases concerning the *Competence of the International Labor Organization as to Agricultural Labor*, and *Competence of the International Labor Organization as to Methods of Agricultural Production*, the French Ministry for Foreign Affairs, as an exceptional measure and with the consent of the Conference of Ambassadors, furnished the Court, at the request of the Registrar, with copies of certain confidential records of the Peace Conference.⁸³ Confidential records were similarly supplied in the *Monastery of Saint Naoum* case, the Registrar having stated that "documents placed at the Court's disposal for the purpose of an advisory opinion need not necessarily be published, especially if the Authority communicating them did not desire it, though of course the Court would have to be able, if necessary, to refer to them, in its opinion."⁸⁴ In requesting the French Foreign Office for certain confidential Peace Conference records in the *S. S. Wimbledon* case, the Registrar pointed out that these documents must, if used by the Court, be communicated to the Parties. The proceedings were terminated before an answer could be received, and the request withdrawn.⁸⁵

The United States-German Mixed Claims Commission of 1922 has been called upon in one instance to pass upon a request rais-

⁸¹ Series C, No. 17-II, pp. 25-31; Series E, No. 6, pp. 297-298.

⁸² Series A, No. 23, p. 41; Series E, No. 6, p. 298.

⁸³ Series E, No. 4, p. 288.

⁸⁴ Series E, No. 6, pp. 296-297.

⁸⁵ Series E, No. 4, pp. 288-289.

ing an issue analogous to a question of privilege. During the proceedings in the so-called *Sabotage* cases (*Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited and Various Underwriters, Docket Nos. 8103, 8117 et al.*, sometimes known as the *Black Tom* and *Kingsland* cases) at an informal meeting of the Commission on May 24, 1938, the Umpire, Justice Owen Roberts, denied the request of the German Agent for leave to inspect certain files in the Department of Justice.⁸⁶ In denying this request Umpire Roberts said:

"The rules of the Commission permit a Commissioner to call for the production of documents. I think that is merely an exercise of the Commission's own power of call, and I think it obvious that the Commission has not power to call on either government to produce from its confidential files what, for reasons of state, it considers would be detrimental to its interests to produce, or would cause improper and unnecessary exposure of private persons and their conduct. So that I think the call of the Commission rises no higher in dignity than a call of a single Commissioner would.

"I think the Commission is without authority to call on either of the litigant governments for production of what in their judgment they think it would be politically, and for reasons of state, inexpedient to expose."⁸⁷

There can be little doubt of the soundness of the actual decision made by Umpire Roberts, refusing the request of the German Agent. This appears clearly from the Umpire's statement of the action he took before announcing his decision:

"I went to the Attorney General and he was good enough to open the files to me confidentially, and while I think it not relevant to the point, I found that the conditions were very much as Mr. Martin [counsel to the Agent of the United States] had described them in his statement to the Commission. The Attorney General stated that for reasons of state policy the Department could not permit a stranger, or, indeed, any American citizen, to go through those files.

⁸⁶ *Administrative Decisions and Opinions*, etc. (1933) 967-997. These cases are now before the Commission on the petition of the Agent of the United States to set aside the decision of the Commission of October 16, 1930, dismissing the claim on the ground of fraud and collusion on the part of important witnesses. For a full discussion of them, see *infra*, secs. 97 and 104.

⁸⁷ Transcript of meeting of the Commission, May 24, 1938, vol. XI, p. 32. The Attorney General had previously declined to grant the German Agent's informal request that he be permitted to examine the files of the Department of Justice for the purpose of verifying a statement by Counsel of the American Agency to the effect that all the records of certain reports in the Bureau of Investigation had been produced. At an informal meeting of the Commission the Umpire announced that he would make a personal call at the Department of Justice for the purpose of examining the records in question. This he did before making the ruling quoted in the text.

He allowed me to examine as many of the files touching the German matters as I desired, and perhaps it is fair for me to say that after an examination of them I can quite understand the Attorney General's position in the matter, and can understand that it is a proper one, in view of what the files contain."⁸⁸

It would be manifestly unwise for such a tribunal as the United States-German Mixed Claims Commission, in the absence of a specific grant of authority in the arbitral agreement, to authorize the Agent of one of the parties to proceedings before it to conduct a personal examination of the files of the other. Such a procedure would be too easily subject to abuse.

That is something quite different, however, from denying to the tribunal itself authority to require the production of particular evidence on the ground that the party concerned regarded it as "politically, and for reasons of state, inexpedient to expose" it. At least in cases where, as is quite generally done, the tribunal is given general authority to require the production of evidence in the possession of the parties, it is suggested that in the exercise of the discretion conferred upon it, the tribunal should itself determine when the confidential character of any evidence warrants a party being exempted from producing it. Practically speaking that is the nature of the action which Umpire Roberts took in this case.⁸⁹

⁸⁸ *Ibid.*

⁸⁹ Such in effect, also, was the position taken by Umpire Parker when a somewhat similar question arose before the Commission early in 1929. The American and German Agents, in accordance with a suggestion of the Commission, had each filed a long list of documents that the Agent for the other Government was to produce and file. Among the documents called for by the American Agent were authenticated copies of records in the German archives relating to the issuance of the cable of January 26, 1915, authorizing the commission in this country of acts of sabotage. The German Commissioner objected very strongly to the Commission's requesting the German Agent to produce these particular documents, saying that:

"... The records referred to by the American Motion cannot add anything to this fact [that is, the authenticity of the cable of January 26, 1915] which is established and admitted. They would only be material if it appeared from them that Von Papen's sworn statement was untrue. Then the German Government though knowing from its files that Papen had committed perjury, would have used an illicit defence in presenting Papen's testimony.

"This most serious insinuation by the claimants is not supported by the slightest evidence. It means a reflection not only upon Papen but much more upon the attitude of the German Government itself which I am unable to agree to." (Annex A, accompanying Order of Commission of May 1, 1929.)

There being a disagreement between the two national Commissioners on the question as to whether the Commission should grant the request of the American Agent as to these documents, the matter was referred to Umpire Parker, who in an Order of the Commission of May 1, 1929, granted the Motion of the American Agent, saying on this point that:

"... The Umpire holds that all records throwing any light on the origin, the purpose, or the application of the cable of January 24-25, 1915, here referred to, are material. In the opinion of the Umpire, the request by the

It will be apparent from a comparison of Umpire Robert's pronouncement with the rulings of the Permanent Court of International Justice, that they are practically in accord. Although the Court has not been faced with the necessity of making an explicit ruling in the matter, it has exhibited considerable deference for the opinion of the Governments concerned, on the question whether a given document is of such a confidential character as to entitle a party to refuse to consent to its consideration. It would seem to be sounder procedure for the Court to assimilate its practice as far as possible to the municipal law rule which accords to the Court the right to determine when a state secret is of such a character as to entitle the party to refuse to produce it. It may not be possible for it to go this far as yet with reference to the records of multilateral diplomatic negotiations in which all parties have not participated, but a general rule is to be deprecated which would permit parties to defeat the production of essential documents by refusing to give their consent on the ground of their confidential character.

No practice is available on which to evaluate the rule concerning professional secrecy. In proceedings before international tribunals, in general, it would seem desirable to limit to as narrow a scope as possible any claim to exemption made on the ground of the professional character of the testimony in question. The privilege should be allowed only under circumstances in which it appeared that the witness would suffer actual injury by divulging the information received by him in his professional capacity.

American Agent for their production was not intended as a reflection on and is not in fact a reflection on the German Government. On the contrary, the Umpire is persuaded that the German Government, in its desire to make a full disclosure of all facts material to a correct decision of these cases, will prefer to produce such of the documents requested as may exist rather than to take the risk of being misunderstood because of failure to produce them." (Order of the Commission, May 1, 1929.)

CHAPTER VIII

PROPOSITIONS NOT REQUIRING PROOF

JUDICIAL NOTICE

Section 89. In General. Judicial notice is here used to refer to those "propositions in a party's case, as to which he will not be required to offer evidence, . . . [being] taken for true by the tribunal without the need of evidence."¹ To the limited extent to which such a rule has been given application in international judicial procedure, it has been derived from Anglo-American law, as a quite limited scope has been accorded analogous rules in civil law procedure, with the exception of German procedure.²

In municipal law no inclusive list of facts of which judicial notice will be taken can be made, nor can any inflexible classification of those facts be given, and this is necessarily even more true in international procedure.³ However, the matter has received sufficient attention to indicate the general character of the subjects which may be judicially noticed.

Section 90. "Notorious" Facts. Certain tribunals have followed the practice of accepting facts of common notoriety as true without requiring the production of proof. In the *Fabiani* case, the arbitrator, the President of the Swiss Confederation, declared that "even in ordinary tribunals notice could be taken of facts so

¹ V Wigmore's *Evidence* 567.

² Sadek-Fahmy, *op. cit.* 243-246, 342-343, 349-351; Lessona, *op. cit.*, vol. I, pp. 211, 214; Bonnier, *op. cit.* 82.

"Facts which are within the knowledge of the Court need not be proved." Art. 291, Code of Civil Procedure (1933), translation.

³ In Anglo-American law the scope of facts which may be judicially noticed includes the following general classes:

"(1) Matters which are so notorious that to all the production of evidence would be unnecessary;

"(2) Matters which the judicial function supposes the judge to be acquainted with, either actually or in theory;

"(3) Sundry matters not exactly included under either of these heads; they are subject for the most part to the consideration that though they are neither actually notorious nor bound to be judicially known, yet they would be capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary." V Wigmore's *Evidence* 579.

notorious that proof would be useless, and that the reason for such rules was even stronger in arbitrations unless prevented by prescribed rules."⁴ Umpire Plumley accepted and gave considerable weight to the testimony of the claimant in the *de Lemos* case before the British-Venezuelan Mixed Claims Commission of 1903, saying:

"The facts testified to by Mr. de Lemos are not obscure in their character, not at all dependent upon his personal knowledge for their establishment, and are easily disproved if untrue. The claimed injury resulted from the bombardment, which is a historical fact, the official particulars of which are unquestionably in the possession of the Government of Venezuela, and it would be impossible to make such claims of injury and not have them susceptible to immediate denial and disproof if untrue, since the damage if it existed was easy to be seen, and if not existent easy to be determined to the contrary. The fact of ownership is a matter of registry as well as of general notoriety in that vicinity, and thus easily susceptible of denial and disproof if untrue."⁵

In the case of *Rodriguez and Company* before the United States-Spanish Mixed Claims Commission of 1871, the Spanish arbitrator declared in his opinion with reference to the record books of the Cuban Junta, offered in evidence to show the contributions made by certain claimants to the Cuban revolutionary forces:

"The repeated and distinct reference in the diplomatic correspondence between Madrid and Washington to a Cuban junta or club, established in New York by Cuban rebels in order to aid the Cuban rebellion, the diplomatic record of the existence in New York of such a junta or club, make formal proof, before the commission, of such establishment and existence quite superfluous.

"The arbitrators and the umpire will therefrom take judicial notice of the notorious doings of that Cuban organization in New York, which was the 'head-center' of the Cuban revolt."⁶

In its judgment in the case concerning *Certain German Interests in Polish Upper Silesia*, the Court refused to accept the Polish contention that proof of acquisition of Czechoslovak nationality could be established only by means of a certificate from

⁴ Ralston, *Law and Procedure, Supplement* (1936) 104-105.

⁵ Ralston's Report (1904) 302, 321.

⁶ "Opinion of the Spanish Arbitrator," p. 5. *Record* (1871), vol. 15, No. 72.

the Czechoslovak Government recording the fact. It then declared with reference to certain data furnished by one of the applicants, Prince Lichnowsky, in proof of his nationality:

"Moreover these data, furnished by the Applicant, relate, at least in part, to matters of common knowledge; Poland does not dispute their accuracy; she merely asks for documentary proof."

Tribunals may in some cases inform themselves by investigations undertaken upon their own initiative of facts of common notoriety, and concerning which there can be no controversy. Thus in the case of the whaleship *Canada*, the arbitrator consulted the United States Naval Observatory at Washington concerning the state of the tide at the time at which the *Canada* went upon the reef off the coast of Brazil.⁷

The matter of judicial notice appears to have received its most extensive consideration in connection with the acceptance by tribunals of "notorious" facts of history as true without the necessity of proof. The nature and extent of the authority of international tribunals in matters of judicial notice was argued at great length during the proceedings of the Spanish Treaty Claims Commission in relation to the ruling of the Commission that it would "take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States and in war between Spain and the United States, passed from the first beyond the control of Spain, and so continued until such intervention and war took place."⁸ Commissioner Woods declared in his opinion on this question that it was conceded that official cognizance might be taken that an insurrection existed in Cuba from February, 1895, until December, 1898, since "to hold otherwise would be to divest the Commission of the knowledge of the provisions and applications of Article VII. of the treaty essential to its jurisdiction." The Commission, he said, was constrained to go a step further and to hold that it was entitled to take judicial knowledge of the military conditions existing in Cuba, and from them say whether Spain was able to control the insurgents, since "the governing facts of the insurrection are [were] historical and well established." The jurisdiction of the Court in matters of judicial notice extended to Cuba, he concluded, as it could not be doubted that, in the case of the Commission "like other courts charged with the administration of the same law [international law], the limits of

⁷ Series A, No. 7, p. 73.

⁸ *United States v. Brazil*, March 14, 1870. II Moore's *Arbitrations* 1745-1746. The arbitrator in this case also made enquiries as to the expense of fitting out a vessel of the *Canada's* class for a four year's whaling cruise, but this was to supplement evidence furnished by the parties.

⁹ Opinion No. 12, April 28, 1903, Fuller's Special Report (1907) 153.

its jurisdiction must be determined not by geographical boundaries, but by the situs of the subject-matter to which its power of adjudication extends."¹⁰

In pursuance of this rule, the Commission in passing on demurrers used its judicial knowledge, in addition to the facts stated by the claimant in his petition, to determine whether the claimant had stated facts sufficient to warrant recovery when he had omitted facts to show that the Spanish authorities could, by the exercise of due diligence, have prevented the injuries for which he claimed indemnity. In the absence of specific proof on the latter point, the Court generally held, on the basis of the rule above stated, that Spain was not liable.¹¹

The authority of the Commission to rely on its "judicial knowledge" as the basis for such a ruling was strongly contested by counsel for claimants.¹² Commissioner Chambers in a lengthy dissenting opinion declined to concur in the decision of the majority, in the first place because he did not think it was "sustained by the general principles of international law," and secondly, because it was "at variance with the attitude of the Government of the United States as interpreted in its political and diplomatic declarations." In support of these reasons he said, in part:

"The general rule is that courts do not take judicial notice of war between foreign States unless by some act of the executive department of their own government the foreign war has been recognized. Therefore the existence of war between foreign countries in which the government of the court is not interested must be proved. (*Dolder v. Huntingfield*, II Ves., Jr., 292). It is only where the executive department of the domestic government has recognized the existence of a war in a foreign territory that courts can take judicial notice of the fact. (*Underhill v. Hernandez*, 168 U.S., 250).

"Following the principles laid down in the two cases last referred to, the principle would seem to be indisputable that courts can not take judicial notice of the characteristics of an insurrection entirely foreign to their national territory and government unless the political department of the domestic government has, by distinct acts, determined its character. If, therefore, a court of the United States can

¹⁰ *Ibid.* 189, 198.

¹¹ *Ibid.* 201.

¹² See *Maragliano* case, "Claimants' Briefs on Liability for Damages by Insurgents," *Claimants' and Government's Briefs* (1901), vol. 3, pp. 544-548; *Mapos Sugar Company* case, *ibid.*, vol. 8, pp. 547-549.

For statement of the position taken by the Government see "Brief, Reply Brief and Oral Argument" in the *Joerg* case, *ibid.*, vol. 2, pp. 72-75, 167-169, 225-230, and "Statement of Facts and Brief for Defendant" in *E. Atkins & Co.* case, *ibid.*, vol. 12, pp. 349-350, and "Brief for Defendant" in *Beal* case, *ibid.*, vol. 12, pp. 373-375.

not take judicial notice of the existence of a war between foreign countries, nor of insurrectionary warfare beyond its national territory, except in consequence of action by the executive department of its Government, it necessarily follows that a court in the absence of executive action can not judicially know that an insurrection in a foreign country has passed beyond the control of the parent government.

"If it be a sound principle that proof must be resorted to to establish the *fact* of an insurrection in a foreign country, and even of the fact of a war between foreign nations in the absence of executive action, courts must necessarily require proof to establish the fact when, if ever, such an insurrection actually reached the stage of 'beyond control.' " ¹³

Other commissions have accepted certain historical facts as true, without requiring the production of any evidence. The United States-Peruvian Mixed Claims Commission of 1868 took judicial notice in the *Johnson* case of certain events and facts which occurred in the Province of Lambayeque in January, 1868, out of which the claim arose, saying that no one could ignore that which comes to his notice and that "the newspapers and tradition make them equally well known throughout the Republic." ¹⁴ In the *Weil* case, the United States-Mexican Mixed Claims Commission of 1868 declared it to be a historical fact that the city of Matamoras was first occupied by the French forces on September 26, 1864. ¹⁵ In the *Barnes* case Commissioner Palacio, of the same Commission, declared that of the three filibustering attempts into Lower California and Sonora led by Walker, Count Raousset-Boulbon, and Crabb, there were "abundant proofs in facts which on account of being historical, can [could] be cited" although they were not in the record. ¹⁶ In its award of April 13, 1852, in the case of the ships *Veloz-Mariana*, *Victoria*, and *Vigie*, the arbitral tribunal, in determining the validity of the seizure of the vessels in question, took judicial notice of the date of the beginning of the intervention of the allied armies in Spain. ¹⁷

¹³ Sen. Doc. No. 25, 58th Cong., 2d sess., pp. 186-187.

¹⁴ Ms. *Proceedings and Awards* (1868) 396.

¹⁵ VII ms. *Opinions* 446.

¹⁶ I ms. *Opinions* 285-286. See also opinion of Commissioner Zamacoma in the *Warner* case, VI ms. *Opinions* 282-283.

¹⁷ de Lapradelle and Politis, *Recueil*, vol. I, pp. 619-621. See also *Petri* case (France v. Mexico), September 25, 1924 ("notice taken that on March 2, 1915, Coyoacan was occupied by Zapatistas"), cited in Feller, *Mexican Commissions*, p. 264. In the *Dodero* case before the Italian-Chilean Arbitral Tribunal, "the arbiter consulted official reports with relation to the bombardment [at Mejillones] and a history of the War of the Pacific, which declared that the belligerents were in agreement upon the important fact that the hostilities had been provoked by the firing of the garrison." Ralston, *Law and Procedure, Supplement* (1936) 196-197.

Section 91. "Judicial" Facts. There are certain facts of which judicial notice may be taken because the judge is presumed to be acquainted with them on account of their relation to the judicial function. The principal instance of facts of this character is that of laws and ordinances. Generally speaking in municipal law, a court is expected to dispense with evidence of a domestic law or ordinance, as "it must be credited with a knowledge of it, or at least with the most competent knowledge where to search for it." However, foreign laws must as a rule be proved.¹⁸

Analogous rules have been applied by the Permanent Court of International Justice. In the *Brazilian Federal Loans* case, the Court said in its judgment that being "a tribunal of international law" it was "in this capacity . . . deemed to know what this law is," but that it "is not obliged also to know the municipal law of the various countries." It added:

"All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished it by the parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken."¹⁹

From this it appears that although the Court does not consider itself bound to know the local law of the states appearing before it, at the same time it does not consider such law simply a question of fact to be proved by evidence produced by the parties. This is important for it leaves the Court free, perhaps even obligated, to resolve through its own researches any uncertainty concerning such a law, if the parties fail to produce adequate proof. This is a sound conclusion, for as Niboyet observes "national courts go too far when they hold that they are not obligated to make such research." After referring to the fact that such courts generally consider foreign law as a simple fact of which the contents must be proved, as any fact, he adds:

"Judgment No. 15, rightly, does not go so far. Rather on the contrary it grants that the Court might have to inform itself of its own accord of the contents of foreign legislation by resort to the powerful means of investigation at its disposal. But it appears to see in that a discretionary power rather than a strict obligation. . . . In the place

¹⁸ V Wigmore's *Evidence* 580-581, 584; Lessona, *op. cit.*, vol. I, pp. 186-188; Sadek-Fahmy, *op. cit.* 343-346; German Code of Civil Procedure of 1933, Art. 293.

In Anglo-American procedure, foreign law is a fact to be proved.

¹⁹ Series A, No. 21, p. 124.

of 'tout ce qu'on peut admettre' we would have preferred 'doit admettre.' Yet it is not certain that this nuance was intended by the Court."²⁰

In view of the difficulties which may attend the ascertainment of local law, parties would be well advised not to leave to the Court the burden of the elucidation of questions of local law essential to the proof of contentions upon which they rely.

In the case concerning the *Consistency of Certain Danzig Decrees with the Constitution of the Free City*, M. Anzilotti in his individual opinion referred to the fact that Article 38 of the Statute, in prescribing the sources of law to be applied by the Court "only mentions international treaties or custom and the elements subsidiary to these two sources to be applied if both of them are lacking," and asserted:

"It follows that the Court is reputed to know international law; but it is not reputed to know the domestic law of the different countries."²¹

Of international treaties, the Court will apparently take judicial notice. In the *International Commission of the River Oder* case, the Court said in its judgment that the fact not having been contested, that Poland had not ratified the Barcelona convention, it was "evident that the matter was purely one of law such as the Court could and should examine *ex officio*." It accordingly refused to accept the request of the Six Governments that Poland's argument based on its non-ratification of this Convention be rejected "*in limine* on the ground that it would be contrary to the letter and spirit of the Rules of the Court and to the practice of arbitral tribunals on which those rules are based, to admit new contentions at an advanced stage of the proceedings and after the opposing parties had been led to believe that such arguments would not be put forward."²²

In accord with this ruling is the action of Judge Huber in the *Palmas Island* case, in relying on the Treaty of Utrecht although

²⁰ J. P. Niboyet, "Juridictions internationales, cour permanente de justice internationale de la Haye (2 arrêts) 12 juillet 1929," 24 Rev. de droit int. privé, 427, 487-488 (1929), translation. See also C. G. Tenekidès, "Les litiges entre états et particuliers devant la cour internationale de la Haye les arrêts 14 et 15," 11 Rev. de droit int. et de leg. comp. 472, 484-485 (3d ser., 1930).

²¹ Series A/B No. 65, pp. 60, 61.

²² Series A, No. 23, pp. 18-19. The French-Mexican Mixed Claims Commission of 1924 said in the *Pinson* case that the registration of a treaty with the League of Nations need not be proved because it was a fact of "notoriété commune." *Jurisprudence de la Commission franco mexicaine des réclamations*, p. 160.

no copy of it had been introduced into the record, saying in explanation of his act that the text was "of public notoriety and accessible to the Parties."²³

The rule adopted by the Permanent Court of International Justice appears sound for a tribunal before whom such a multiplicity of parties may appear, often in the same proceeding. However, there seems to be no reason why *ad hoc* tribunals established for limited purposes, usually by two states, should not follow the ordinary rule of municipal procedure of taking judicial notice of "domestic law," including in such a case the law of the parties. Such is the rule which has been adopted in the few instances in which the question has been raised.²⁴ In the *Chamizal* case, the tribunal, at the request of the American Agent, agreed to take judicial notice of all the proceedings of the International Boundary Commission, established under the treaty of March 1, 1889, "whether they have or have not been published and whether or not they form part of the pleadings."²⁵ By analogy to the practice in Anglo-American procedure, international tribunals would seem to be warranted in taking judicial notice of the laws of a former sovereignty which has by succession or transfer become incorporated into one of the states a party to the proceedings before them.²⁶

In Anglo-American procedure courts are generally presumed to know the facts of political organization and operation of the state, since they are determined by the law.²⁷ Applying the principle underlying this rule, the United States-Chilean Mixed Claims Commission of 1892 took judicial notice in the *Didier* case of the

²³ *Arbitral Award* (The Hague, 1928) 21.

²⁴ United States-Panamanian Joint Claims Commission, Feb. 26, 1904, *Final Report* (1920) 24; United States-French Mixed Claims Commission, Jan. 15, 1880, III Moore's *Arbitrations* 2219. The Spanish Treaty Claims Commission in its opinion in the *Mortgage* cases, No. 20, Feb. 4, 1904, held that foreign laws must be pleaded and proved like other facts, but it had reference to laws other than those of the United States and Spain. *West India Oil Refining Co. case*, "Brief for the Defense," *Claimants and Government's Briefs* (1901), vol. IX, p. 499.

The Mixed Arbitral Tribunals are of special interest in this respect as disputes between individuals were submitted to them as well as disputes between states. Necessarily, in cases of the former kind, the Tribunals took judicial notice of the laws of the states by which they were established. See J. C. Witenberg, "Les tribunaux arbitraux mixtes et le droit international privé," 58 *Journ. de droit int.* 991-1003 (1931).

²⁵ United States v. Mexico, June 24, 1910, *Memoria documentada del juicio de arbitraje del Chamizal*, p. 475.

²⁶ "So far as by subdivision or amalgamation the former laws of another sovereignty have to any extent become a part of the law of the forum, such former law of the other sovereignty may properly be noticed. This principle has been applied to the laws of another of the United States from which that of the forum was formed by subdivision, to the laws of Mexico, to the laws of the British colony of Pennsylvania, and to the laws of England before the American Revolution; but is, of course, not applicable to the laws of England since that time." V Wigmore's *Evidence* 586.

²⁷ V Wigmore's *Evidence* 587-588.

fact that the recognition of Chile by the United States took place in 1822, and that consequently legal relations between the states began only as of that date.²⁸ Upon the same basis judicial notice has been taken in a number of cases of the identity and official position of well known army officers, and of the identity of armed forces known to have been operating in a specified area at a given time.²⁹

Section 92. Conclusions. It will be apparent from the foregoing analysis that the doctrine of judicial notice has received comparatively meager development at the hands of international tribunals. The paucity of references to the matter suggests the probability that tribunals may have resorted to the use of judicial notice without taking the trouble to record the fact in their opinions. In view of the difficulties experienced by international tribunals in the matter of evidence, it would seem to be a device admirably fitted to supplement the inadequate evidence often furnished by the parties, especially in proceedings before claims commissions. It would need necessarily to be used with discretion by a tribunal with the limited jurisdiction which generally characterizes an international tribunal, but it could undoubtedly safely be used to obviate the necessity of proof of many historical, political, and "judicial" facts, and facts of common notoriety in the countries parties to the proceedings. Special vigilance would be required to avoid relieving a party from the necessity of submitting evidence of a truly controversial fact, but judges of the competence usually required of the members of international tribunals could be trusted fairly to exercise discretion in this respect.

The observations of Professor Thayer with reference to the latent possibilities of judicial notice in municipal procedure seem especially appropriate in relation to international procedure:

"Courts may judicially notice much which they cannot be required to notice. That is well worth emphasizing; for it points to a great possible usefulness in this doctrine in helping to shorten and simplify trials. It is an instrument of great capacity in the hands of a competent judge; and it is not nearly as much used in the region of practice and evidence as it should be."³⁰

²⁸ *Minutes of Proceedings* (1894) 68. See also "Brief of Claimant," *Memorials, Briefs and Documents* (1892) vol. I, pt. 2, No. 5, pp. 1-2.

²⁹ *Enderle* case (United States v. Mexico), July 4, 1868, V ms. *Opinions* 395 (Opinion of Commissioner Wadsworth); *Mazapil Copper Co., Ltd.* case (Great Britain v. Mexico), November 19, 1926, *Decisions and Opinions*, pp. 132, 135; *Ward* case, *ibid.*, *Further Decisions and Opinions*, pp. 107, 109; *B. Himar* case (France v. Mexico), September 25, 1924, cited in Feller, *Mexican Commissions*, p. 264.

³⁰ *Preliminary Treatise on Evidence* (1898) 300, quoted in V Wigmore's *Evidence* 599.

Such a broad development of the doctrine of judicial notice requires a flexible application of the underlying principle of notoriety in fact. As suggested by Wigmore, the precedents of former judges in declining or assenting to notice specific facts should not restrict a judge from noticing a new fact, "provided only that the new fact is notorious to the community."³¹

SOVEREIGN ASSERTIONS

Section 93. Assertions of Fact by a Government.³² It requires no multiplication of precedents to demonstrate that assertions of fact upon which contentions are based, by or on behalf of claimants before claims commissions, must be supported by evidence to warrant an award. The general rule is well stated in Rule No. 9 of the rules of procedure adopted by the Spanish Treaty Claims Commission:

"All facts necessary to sustain an award and all special facts, proof of which is required by the commission must be established by evidence and not otherwise."³³

This rule has been uniformly applied by such commissions.³⁴

A different and unique rule was contended for by the Netherlands Government in the *Palmas Island* case. Its *Memorandum* was prefaced by this note:

"In the following memorandum various documents are being referred to. Authentic copies are available; they will be produced if desired by the Arbitrator. The more important of the documents are annexed to the memorandum."³⁵

³¹ V Wigmore's *Evidence* 599.

³² Cf. *supra*, secs. 24, 26, 32, 58.

³³ *Documents and Opinions to June 13, 1903*, p. 16.

³⁴ *Thompson case* (United States v. Mexico), July 4, 1868, I ms. *Opinions* 67-68 (Commissioner Wadsworth for the Commission); *Eaton case*, *ibid.*, I ms. *Opinions* 305 (Commissioner Wadsworth for the Commission); *Mitchell case* (Great Britain v. Chile) *Reclamaciones* (1894-1896), vol. II, p. 352; *Pol-where case*, *ibid.* 402, 414; *Alvarado case*, Nicaraguan Mixed Claims Commission, May 17, 1911, ms. *Opinions* (1915), vol. VI, Judgment No. 2010; *Vollweiler case* (United States v. Germany), Aug. 10, 1922, *Administrative Decisions and Opinions*, etc. (1932) 890-892; Florida Indemnity, Domestic Claims Commission, Act of March 3, 1821, V Moore's *Arbitrations* 4507, 4512; Dominican Claims Commission, June 26, 1917, *Informe final de la Comision dominicana de reclamaciones de 1917* (Santo Domingo, 1920) 29-30.

"While ordinarily it is incumbent upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be." *Parker case* (United States v. Mexico), Sept. 8, 1923, *Opinions* (1927) 39.

Witenberg and Desiroux say with reference to this point: "Toute affirmation de fait non assortie d'une preuve devra être écartée." *Op. cit.* 227.

³⁵ *United States v. Netherlands*, Jan. 23, 1925, *Memorandum* (The Hague, 1926) 5.

Accordingly, not all assertions of fact made by the Netherlands Government were supported by accompanying evidence. This was frankly asserted in the Counter-Memorandum to be unnecessary in certain instances:

"With regard to the contention of the United States that no evidence has been laid before the United States of the vaccination of 1895, or of the assistance furnished in 1904 after a hurricane, the Netherlands Government submit that, if facts like these are stated to have been done by them or their agents such statements do not require corroboration by further evidence; such statements are evidence in themselves."³⁶

The soundness of this procedure was strongly contested by the United States in its Counter-Memorandum:

"It is unnecessary to observe that, whenever contentions based upon an assertion of facts are advanced, such assertions should obviously be supported by evidence; that any weight that can properly be given to the assertion must be determined in the light of the character of the supporting evidence produced; and that in any case in which no evidence is produced the assertion must be regarded to be valueless, except in so far as it may serve to reveal the absence of evidence. If this view were not correct, an arbitral tribunal would be in the invidious position of being called upon merely to record its judgment with respect to the correctness of unsupported assertions advanced by either side in an arbitration, whereas it is the function of a tribunal to determine a controversy in the light of evidence and by the application of proper rules or principles of law."³⁷

The note prefacing the Netherlands Memorandum was declared to indicate a procedure "properly . . . characterized as remarkable and without precedent in international arbitrations." It was conceded that "evidence in cases before international tribunals is not governed by the rigid rules which are applied by domestic courts," but contended that "certain elementary principles are of course common to both kinds of tribunals."³⁸

The views of the Netherlands Government were elaborated in its *Explanations*, in response to a request from the Arbitrator for its observations on the divergency of opinion existing between the Parties "on the subject of the rules of evidence and particularly as to the admissibility of allegations not supported by documentary evidence." It stated explicitly its view that assertions by a Govern-

³⁶ *Counter-Memorandum* (The Hague, 1926) 76.

³⁷ *Counter-Memorandum* (Washington, 1926) 1.

³⁸ *Ibid.* 2.

ment as to its own acts are to be taken as true without other support than its own sovereign assertions:

"But the Netherlands government do not think reasonable a thesis by which an Arbitrator should be bound to discard statements made in the name of the Government of a given State, and presented under the cover of a letter signed by or on behalf of the responsible Minister of the Crown, the less so when such statements are part of an elaborate enumeration of facts which partly cannot be called into question and are all in harmony with one another. The even farther reaching conclusion of the United States Government that such statement 'may serve to reveal the absence of evidence' and that its use 'raises a presumption as to its character in view of the non-production of evidence to support it' seems to the Netherlands Government to be a travesty of true principles. *On the contrary a statement by a Government seems to the Netherlands Government to create a presumption of its veracity.*" [Italics added.]³⁹

The Arbitrator, it was declared, "is entirely free to decide what sort of evidence he wishes to accept." The question "what facts stated by one party and contested or not by the other party" may require further explanation or evidence "is, unless there are special rules in the 'Compromis,' entirely left to the Arbitrator."⁴⁰

To this the United States rejoined that "nations come before an arbitral tribunal as private litigants come before a domestic court," and that "they must of course prove their allegations." The assertion by the Netherlands Government that assertions of fact by a government as to its own acts or those of its agents are "evidence in themselves," the United States declared to be "a peculiarly spirited attitude the like of which if it were heretofore assumed by any litigant before a domestic court or before an international court, has not come to the notice of the United States." It added that the United States did "not insist on any prerogative by virtue of which the allegations in its pleadings must be regarded as 'evidence in themselves,'" and finally concluded:

"Whether they [allegations in the pleadings] are facts is a judicial question for the determination of the tribunal in the light of the evidence produced to support such allegations.

"It is stated by the Netherland Government that 'it is excluded that, when they reproduce a document, or when they say that a photograph reproduced is the photograph of a certain spot, such a document is not a copy of the original, or that the photograph is untrue.' A statement of that kind

³⁹ *Explanations* (The Hague, 1927) 11, 13.

⁴⁰ *Ibid.* 7-8.

represents one way of disposing of a matter of this kind, but the United States desires to point out that so far as it is aware, no nation has ever taken the position in connection with an international arbitration that a Government when it appears as a litigant occupies a position which precludes it from authenticating documents produced. . . ." ⁴¹

Judge Huber appears to give partial endorsement to the Netherlands contention by stating in his opinion that the arbitrator must be free to estimate the value of assertions made by the Parties, both as to facts in general, and as to their acts as Governments:

"It is for the Arbitrator to decide both whether allegations do or—as being within the knowledge of the tribunal—do not need evidence in support and whether the evidence produced is sufficient or not; and finally whether points left aside by the Parties ought to be elucidated. This liberty is essential to him, for he must be able to satisfy himself on those points which are necessary to the legal construction upon which he feels bound to base his judgment. He must consider the totality of allegations and evidence laid before him by the Parties, either *motu proprio* or at his request and decide what allegations are to be considered as sufficiently substantiated. . . ." ⁴²

He added, however, that no documents which were not on record had "been relied upon, with the exception of the Treaty of Utrecht the text of which is of public notoriety and accessible to the Parties, and no allegations not supported by evidence . . . taken as foundation for the award." ⁴³

The contention that assertions of fact by a government as to its own acts or acts of its agents are evidence in themselves and do not require corroboration by further evidence is not in accord with the practice of international tribunals, if it is intended to include allegations upon which the government relies. Ultimately the determination of what assertions may properly be left without

⁴¹ *Rejoinder* (Washington, 1927) 7-8, 13-14, 35.

⁴² *Arbitral Award* (The Hague, 1928) 20. Cf. the following statement made by the Permanent Court of International Justice in the course of its opinion in the case concerning *Certain German Interests in Polish Upper Silesia*, speaking with reference to the sufficiency of certain data furnished by one of the applicants to establish his nationality, Poland having requested the production of documentary proof:

"The Court is entirely free to estimate the value of the statements made by the Parties. It considers that the fact that the Prince was at the decisive date, established in a territory recognized by the Treaty of Versailles as forming part of Czechoslovakia, is sufficiently proved by the statements made in the Case on the subject, which have not been disputed, and by the Prince's [Lichnowsky] declaration dated January 1st 1922, by means of which he opted for German nationality in accordance with the terms of the German-Czechoslovak Convention." Series A, No. 7, p. 73.

⁴³ *Arbitral Award* (The Hague, 1928) 21.

evidence in support must rest with the tribunal, so that Judge Huber stands on sound ground when he says that it is for the arbitrators to decide what allegations come within the knowledge of the tribunal and need no proof. But if any statement or allegation of a fact in issue concerns a matter not falling within the knowledge of the tribunal, a party presents it without evidence in support on peril of having it disregarded. To expect a tribunal to accept such statements, upon the mere fiat of the governments appearing before it, would put it too much at the mercy of the parties. International litigation might be reduced to a contest in the production of competing allegations of fact, the tribunal being deprived of any rational basis for determining their comparative truth and value. Statements made by officials or agents of a government on its behalf are self-serving and must be weighed in the light of that fact if international proceedings are to preserve a judicial character.

There is no sound reason for exempting a government from the usual requirement that litigants support with evidence assertions upon which they base their contentions. This does not mean that every assertion of fact must be supported by evidence. Many assertions made in international proceedings are of historical or political facts of common knowledge which obviously require no proof. But to excuse a litigant merely on the ground of sovereign character, from producing proof of its own acts, when the facts concerning those acts have been offered in support of contentions made, would be to deprive the proceedings of their essential judicial character. The true test in such cases is the character of the facts asserted, not the character of the party making the assertion.⁴⁴

⁴⁴ In its opinion in the case of the schooners *The Jessie*, *Thomas F. Bayard*, and *Pescawha*, the United States-British Mixed Claims Commission of 1910, observed that "the insufficiency of proof as to damages, and the alleged exaggeration of the claims formulated by the British Memorial are not enough in themselves to justify the charge that they are fraudulent in character," and added: "For this Tribunal, the mere fact that the claims are presented by the Government of His Britannic Majesty is sufficient evidence of their complete *bona fides*." Nielsen's Report (1926) 479, 481. For a contrary view see opinion of the Spanish Arbitrator in the *Delgado* case before the United States-Spanish Mixed Claims Commission of 1871. *Record* (1871), vol. 11, No. 125.

See also *Pavon* case (United States v. Mexico), July 4, 1868, VI ms. *Opinions* 328, 329; *Pelletier* case (United States v. Haiti), May 24, 1884, *Record of Proceedings* (Washington, 1885), vol. I, pp. 743, 750-751; *May* case (United States v. Guatemala), Feb. 23, 1900, Award of Mr. Jenner, 1900 For. Rel. 656, 661; *Shufeldt* case (United States v. Guatemala), Nov. 2, 1929, *Shufeldt Claim*, Dept. of State, Arbitration Series No. 3, p. 574. For discussion of effect of assertions of law by a government, see Opinion of Commissioner Chandler, No. 12, before the Spanish Treaty Claims Commission. Fuller's Report (1907) 247.

For statement of *May* case, see *supra*, pp. 130-131.

CHAPTER IX

REHEARING AND REVISION ON THE BASIS OF NEWLY DISCOVERED OR FRAUDULENT EVIDENCE

IN GENERAL

Section 94. Nature of Rehearing and Revision. Modification of awards arising out of matters relating to evidence is usually sought through the procedure of rehearing or of revision.¹ In such procedure it is essential to distinguish three situations in which modification may be sought, namely, after the hearings have been closed and the case submitted but before a decision by the tribunal, after decision but before the tribunal has adjourned, and after decision and adjournment. In the third situation, it is important to consider whether the tribunal may be reconvened, or whether modification may be had only through agreement between the parties, either by direct action, or the convening of a new tribunal.

The *ad hoc* character of most international tribunals complicates the problem of obtaining modification of arbitral awards, especially in the third situation named above. A further factor adding particular importance to the matter of modification is the absence of any system of appeal or cassation in international judicial procedure. The procedure of rehearing and revision should not be confused, however, with appeal or cassation. The difference between them has been aptly described by the Franco-German Mixed Arbitral Tribunal in its opinion in the case of *Heim and Chamant v. Etat allemand* in explaining the reason for the inclusion in its rules of procedure of provisions concerning revision:

¹ Only modification sought upon the basis of newly discovered evidence or of the use of fraudulent evidence will be considered here. The latter does not include fraud upon the part of the arbitrators or of the parties or their agents unless such fraud relates to matters of evidence. The general question of the modification or nullity of arbitral awards upon the numerous grounds assigned by the writers, such as excess of jurisdiction (*l'excès de pouvoir*), and fraud upon the part of the arbitrators, while a matter of great interest, is not relevant to a study of evidence. Thus the fraud imputed to the United States-Venezuelan Mixed Claims Commission of 1866, consisting of collusion among the American Commissioner, the United States Minister at Caracas and his brother-in-law, who acted as attorney for a number of claimants, and the Umpire, does not fall within the purview of this study. See II Moore's *Arbitrations* 1660-1674.

"Whereas the arbitral tribunal in introducing revision into its rules of procedure, desired to embody in international arbitration an institution of internal law which has its own significance; that it has its place essentially in view of the risks of error to which the tribunal finds itself exposed, by application of the treaty, in the exact ascertainment of facts often ancient and particularly difficult to establish because of the difficult circumstances which surround them; that it is against such risks or errors of fact that the revision provided by the Rules is aimed to furnish a guaranty to the parties . . . ;

"Whereas, by the institution of revision, the Arbitral Tribunal did not have the intention of creating in an indirect manner, a second trial not provided by the Treaty of Versailles in which the High Contracting Parties have agreed, on the contrary to consider the decision of the Arbitral Tribunal as final (art. 304g) ; that it is only for error of fact that the Rules of Procedure of the Arbitral Tribunal have instituted revision." ²

A rehearing is somewhat analogous to appeal or cassation, as it involves first a finding that there is sufficient new evidence or sufficient evidence of fraud to warrant reopening the case for a retrial or reargument on the merits. Revision, however, as the term has come to be generally used, is more limited in scope, consisting of an amendment of the award without a reargument. The term is usually used with reference to an amendment upon the basis of new evidence but does not necessarily exclude an amendment upon the basis of a showing of fraudulent evidence. It must be added, however, that strictly speaking neither of these terms are words of art as they are not infrequently used loosely in an interchangeable sense to denote any procedure in which it is sought to obtain the reopening of an award for the purpose of amending it.

REHEARINGS

Section 95. General Principles. In the absence of specific authorization to that effect, it is clear that a tribunal cannot submit to a new examination awards made by a previous tribunal because the parties in the previous case have agreed to accept the decision as final. This was the position taken by the Board of Commissioners of 1849 with reference to certain awards made by the United States-Mexican Mixed Claims Commission of 1839. In the *Leggett* case the claimant contended that the Umpire of the 1839 Commission had been improperly influenced in reducing the amount of his

² 3 *Recueil des décisions* 50, 54 (1924) translation.

award to \$99,487.94,³ by certain purported records of proceedings in Mexican courts, alleged to have been "false, forged and spurious." Although the Commission found "that the pretended record was grossly false and spurious," and that it could "attach no verity to it in any respect," it held that it was not "competent to revise the proceedings or opinions of the Umpire or to reopen cases by him decided." It added:

"Under circumstances like these disclosed here we cannot doubt that a Court of Chancery would set aside awards, or other legal proceedings between parties, and order a new trial of the whole case—but we have no such power."⁴

It did, however, make an award on the ground of a "new and independent wrong, distinct from the original grounds of claim preferred to the former Board," consisting of the diminution of the Award suffered as a result of the use of false testimony.⁵

The Commission similarly declined to reopen the award in the case of the *Schooner Rebecca and Eliza* in which it was alleged by the claimant that the value of the cargo had "by some unaccountable oversight" been "wholly overlooked by the umpire." It declared that it was "of opinion that the decision of the umpire was final and conclusive, and that by the terms of the Convention of 1839 Mexico was released from any further claim or liability growing out of the transaction on which it was founded."⁶

Baron Blanc, one of the successive umpires of the United States-Spanish Mixed Claims Commission of 1871, extended this rule to include decisions of previous umpires of the same Commission, saying in the *Price* case:

"As a rule, the undersigned umpire does not consider himself empowered to review the formal decisions of the precedent umpires, such decisions being essentially definitive according to international usages."⁷

Likewise, there can be little doubt that in the third situation enumerated in section 94, namely, after the decision of the case and the adjournment of the tribunal, a tribunal cannot consider a petition for rehearing unless the parties have reserved the right

³ The Mexican Commissioner had rejected the claim entirely, while the American Commissioner had reported to the Umpire in favor of it, fixing the damages at \$407,079.41. *Ms. Opinions* (1849), vol. 2, pp. 852, 856.

In the *Pious Fund* case between the United States and Mexico under the treaty of May 22, 1902, the Tribunal held that the rule of *res judicata* "applies not only to the judgments of tribunals created by the State, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the Compromis." *Proceedings* (1902) 390.

⁴ *Ms. Opinions* (1849), vol. 2, pp. 865-866.

⁵ *Ibid.* 866-872.

⁶ II Moore's *Arbitrations* 1274.

⁷ III Moore's *Arbitrations* 2189.

in the arbitral agreement to make such a petition, and have authorized the tribunal to hear it.⁸ This accounts partly for the small number of cases in which petitions for rehearing have been made, as such petitions can only be made, in general, before claims commissions in which cases are taken up and decided in order, consequently, raising the possibility of a request for a rehearing before the final adjournment of the commission.

Nor can a rehearing be obtained by submitting under a new guise and alleging a different grounds of responsibility, a claim previously submitted and dismissed, even though different items and evidence be included in the new case. The test is whether the injury for which indemnity is sought is the same and if it is, the allegedly new claim will be dismissed.⁹

In the *Schwarz* case before the United States-German Mixed Claims Commission of 1922, a petition for rehearing was dismissed, having been based upon the ground that "the claimant's attorney did not understand the *purpose* for which a full disclosure of the facts on a particular issue" had been sought by the Commission, and the assertion that "had the *purpose* been understood, substantially different testimony would have been furnished by the claimant." The Commission declared that, although its rules made no provision for a rehearing of any case in which a final decree had been entered, the petition had been carefully considered and found without merit.¹⁰

Section 96. Newly Discovered Evidence: In General. Practice is not sufficiently extensive or uniform in character to warrant the conclusion that there is a definitive rule on the question whether a rehearing may be granted solely on the basis of newly discovered evidence. A preponderance of the cases in which the matter has been considered appears to favor a rule that in the absence of specific authority a commission may not grant a rehearing on the basis of such evidence after having rendered a formal decision.

Section 97. The Same: United States-German Mixed Claims Commission of 1922. Of the Commissions in which the question has arisen in a form requiring full deliberation, it has perhaps been subjected to most careful analysis in the so-called *Sabotage* cases (*Lehigh Valley Railroad Company, Agency of Canadian Car and*

⁸ This would be equally true of a permanent tribunal such as the Permanent Court of International Justice, except in cases where the parties had conferred obligatory jurisdiction upon it. A petition for a rehearing might be submitted, invoking this jurisdiction, the Court, of course having authority to determine the propriety of entertaining the petition.

⁹ *Machado* case (United States v. Spain), Feb. 12, 1871, III Moore's *Arbitrations* 2193-2194; *Knowlton and Co. et al.* case, *ibid.* 2194-2196; *Delgado* case, *ibid.* 2196-2200.

¹⁰ *Administrative Decisions and Opinions*, etc. (1928) 840. Accord: *Frohm* case, *ibid.* 841; *Vance* case, *ibid.* 842.

Foundry Company, Limited, and Various Underwriters case, Docket Nos. 8103, 8117, et al., sometimes known as the *Black Tom* and *Kingsland* cases) before the United States-German Mixed Claims Commission of 1922. Claim has been made by the United States in these two cases for damages resulting from two fires, one at the Black Tom Terminal in New York harbor in 1916, the other at the Kingsland Ammunition plant in Kingsland, New Jersey in 1917. The claims were dismissed in a unanimous decision of October 16, 1930, on the ground that there was not sufficient evidence upon which to hold that the fire had been started, as alleged by the United States, by persons employed by responsible agents of the German Government.¹¹ Petitions by the American Agent for rehearing and reconsideration filed on January 12 and 22, 1931, assigning as reasons for the requested action that the Commission had misapprehended the facts and committed errors of law, were unanimously dismissed on March 30, 1931.¹² In a letter of the same date to the two Agents the Commission stated that it desired them "without waiting for the presentation of any additional new evidence, to submit briefs discussing, first, the jurisdictional considerations and legal principles which should govern the Commission's decisions as to the admission of new evidence in these cases, and, second, what kinds of new evidence, if any, should be admitted." The letter added:

"The Commission in this connection points out that the two Agents have already presented some argument on the question of new evidence and each Agent has based his argument in part on the decision of the Commission in the Philadelphia-Girard National Bank case. To avoid further discussion as to the proper interpretation of the language used by the Commission in that case we think it best to advise you that the National Commissioners are agreed that it was the intention of the Commission in that decision to rule against the introduction of further evidence of any kind after the evidence had once been closed and a decision promulgated. This ruling is not irrevocable, but it is desirable that argument addressed to the question should be devoted not to the interpretation of that language but to the principle itself."¹³

Briefs were filed in pursuance of this request on April 27, 1931, and on July 1, 1931, the American Agent presented a supplementary petition for rehearing on the ground of newly discovered evidence. Additional evidence was filed on both sides, and

¹¹ *Administrative Decisions and Opinions*, etc. (1933) 967-997.

¹² *Ibid.* 995-997.

¹³ Quoted in opinion of Justice Roberts, Umpire, Dec. 15, 1933, *Report of American Commissioner* (Washington, 1934), Annex E, pp. 63, 64.

by mutual consent the hearing on the petition was without prejudice to Germany's objection to the Commission's jurisdiction to pass on the question of a rehearing, it being agreed that if the new evidence filed would not change the result reached in the decision of October 16, 1930, the jurisdictional question need not be answered. The national Commissioners having disagreed as to the effect of the evidence, the Umpire, on December 3, 1932, dismissed the petition for rehearing.¹⁴ In his opinion he analyzed the new evidence at great length, and stated that he had also examined large portions of the evidence filed prior to the decision of October 16, 1930, "with the object of comparing it with the new evidence in order to appraise the new evidence and its effect in connection with the old." He concluded, finally, that the question as to jurisdiction need not be answered as it was his opinion "that if the new evidence were formally placed on file and considered in connection with the whole body of evidence submitted prior to the Commission's opinion of October 16, 1930, the findings then made and the conclusions then reached would not be reversed or materially modified."¹⁵

On May 4, 1933, the American Agent filed a further petition alleging, in essence, that certain important evidence furnished by various witnesses on behalf of Germany had been fraudulent, incompetent, collusive, and false, that there had been collusion between German and American witnesses, and that evidence could be produced to show that the Commission had been misled by the German evidence. The Commissioners certified to the Umpire their disagreement on the power of the Commission to entertain this application.¹⁶ In his opinion of December 15, 1933, therefore, the Umpire had to consider, not the merits of the allegations of fraud, or the sufficiency of the evidence to warrant a rehearing, but the question whether the Commission could even consider an application for rehearing. In the course of his opinion, the Umpire considered under three heads the power of the Commission to reopen a case in which it had rendered a decision: (1) Where the Commission had misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law; (2) where so-called "after discovered evidence" is presented; (3) where it is alleged that the decision has been obtained on fraudulent evidence.¹⁷ Only the conclusion as to the second will be considered at this point, the other two being reserved for later treatment.

¹⁴ *Ibid.* 66.

¹⁵ *Administrative Decisions and Opinions*, etc. (1933) 1004, 1005, 1029.

¹⁶ *Report of the American Commissioner*, Annex E, p. 67.

¹⁷ *Ibid.* 73-76. For a discussion of the effect of the allegations of fraud upon the right to rehearing in these cases, see *infra*, sec. 104.

With reference to the question of jurisdiction to reopen for the presentation of "after discovered evidence," Justice Roberts, the Umpire, declared he was of the opinion the Commission had no such power. He said that where, as in municipal procedure, courts have "the power to make an order to close the proofs in any case and compel the parties to proceed, either party who was not then ready, because it had not exhausted its sources of information and evidence, might well have an equity to ask a reopening that it might be permitted to offer evidence theretofore unavailable." Basing his conclusion upon the provision in the second paragraph of Article VI of the Agreement of August 10, 1922, that "the commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of, or in answer to any claim," and that no time limit was set in this agreement for the closing of proofs, he declared that the Commission had no power to enter an order for the final closing of the record in any case. He said that it had never done so "without consent or over objection." Consequently, he asserted, "the American Agent was under no obligation to close his record and submit his case at the Hague if he knew, or had reason to expect that further evidence was obtainable." He concluded:

"The Agreement does not contemplate that when the two Agents signify their readiness to submit a case and do submit it upon the record as then made to their satisfaction, obtain a hearing and decision thereon, the Commission shall have power to permit either Agent to add evidence to the record and to reconsider the case upon a new record thus made."¹⁸

The American Commissioner had held that "it should be made clear that the Commission will consider new evidence in support of a rehearing petition showing . . . that new evidence not previously available has been discovered which would justify a different decision." In support of this conclusion he asserted:

"It [the Commission] has always assumed, and acted on that assumption, that it was fully empowered to correct any clerical or pro forma errors in its decisions or awards, and this has been done as a matter of routine procedure. It has also assumed and acted on that assumption, that on any application for reopening and revising a decision on the merits the Commission should receive and consider any evidence offered in support of such application, reserving for decision, after the examination of such evidence, the question of whether or not the Commission, in its discretion, would grant the application based thereon."

¹⁸ *Ibid.* 75.

"It seems clear that if the Commission had been of the opinion that under no circumstances was it at liberty or empowered to reopen and reconsider a decision already made it would not have entertained, even tentatively, a petition for reconsideration, but would have dismissed it as a matter of course without examining or considering the grounds upon which it was made."¹⁹

The German Commissioner on the other hand, asserted that "without . . . authorization no court . . . has a right to reopen," and that since there was no authorization in the Agreement, the Commission had no such power. He declared that "the Commission's practice to alter a decision wherever it found that an error in its finding of fact *on the evidence produced at the time the claim was submitted* or in applying the principles of law and the rules of the Commission had influenced the decision, had nothing whatever to do with the question of reopening on the ground of *new evidence*." [Italics in original.] He added that the Commission had always acted unanimously in these cases, and that it was significant that the Commission had "never changed a decision except with the consent not only of both Commissioners but also of both Agents."²⁰

¹⁹ *Ibid.* 50, 40, 41.

²⁰ *Ibid.* 30, 37.

The case has not yet been finally disposed of, but the subsequent rulings of the Commission have not altered the position taken by the Umpire on the question of newly discovered evidence. In his decision of Nov. 9, 1934, he overruled a motion by the German Agent that the American Agent be required to "file a brief, bill of particulars, or some other written statement substantiating the contentions advanced in his petition for a rehearing." On July 29, 1935, he denied a motion by the American Agent for an order "to the effect that the Commission does not desire to take submission of these claims until all evidence that either Government desires to have considered *in support of or in opposition to the pending petition for rehearing has been filed* in order that the Commission may, when it takes submission, enter an order finally disposing of these claims on their merits." The Umpire ruled in favor of the German contention that there must first be a hearing to determine whether the claimants' contentions as to fraud are made out, and if so then a further hearing on the merits, in which the entire case would be reopened and argued on all the evidence, both old and new. The Commission ruled by a unanimous vote on June 3, 1936, that its decision of Dec. 3, 1932, holding that the new evidence, if considered on its merits, was not sufficient to warrant a reversal or modification of the decision of Oct. 16, 1930, should be set aside. That decision, it appeared, had been decisively influenced by a suspicion of bad faith on the part of the American Agent in his allegedly suppressing an adverse expert report on the authenticity of certain vital documents, and it was now declared that suspicion had been entirely without foundation. Subsequently, an agreement was negotiated at Munich by representatives of the two Governments for a compromise settlement. In July, 1937, the motion of the American Agent for an award on the basis of this settlement was denied by the Commission on the ground that it was contrary to its practice to make such an award except on the basis of an agreed statement of facts signed by both Agents, the German Agent having refused to sign the statement of the settlement. The case is now before the Commission on the American Agent's motion to set aside the decision of Oct. 16, 1930, on the ground of fraud and collusion on the

The principal previous case in which the Commission had considered its power to reopen cases in which a final decree had been made was that of the *Philadelphia-Girard National Bank*. In that case a petition for rehearing having been submitted together with certain additional evidence, the Commission said that although, "conforming to the practice of international commissions," its rules made no provision for a rehearing in any case in which a final decree had been made, it had carefully considered the petition and supporting evidence. It then announced "certain principles having general application to petitions and requests for rehearings . . . by which the Commission . . . [would] be guided in dealing with this and other similar applications," among them being the following:

" . . . where a rehearing is demanded merely on the ground that by reason of newly submitted evidence the underlying facts were different from those appearing in the record as submitted at the time of the decision, the Commission will not grant a reopening or a reconsideration of the award."²¹

It dismissed the petition.

In his opinion of May 6, 1933, the German Commissioner invoked this ruling as applicable to the petition for a rehearing in the *Sabotage* cases.²² The American Commissioner considered that it was not applicable on the following grounds: (1) That the decision announcing the rule was not in the nature of an administrative decision, having been issued when the work of the Commission was practically finished, and intended to serve as an aid to the Agents in bringing the work of the Commission to a conclusion by discouraging petitions for rehearing; (2) that the rule stated did not control or influence the conclusion reached by the Commission in that case; (3) that the rule did not have the authority of a decision by the Commission on an issue argued and submitted by the Agents, consequently not establishing a precedent, as it had not been formally presented and argued by the Agents; (4) that the Commission in its letter of March 30, 1931, requesting the Agents to submit briefs on the question of its jurisdiction to reopen had specifically stated that argument "should be devoted not to the interpretation of that language [of the *Philadelphia-*

part of important witnesses. If set aside, it will yet remain for the case to be reheard on the merits. (Mimeographed copies of the opinions of the Commission since that of Dec. 15, 1933, have been made available to the writer through the courtesy of the Counsel to the American Agent.)

²¹ *Administrative Decisions and Opinions*, etc. (1933) 939, 940. In the *Achelis* case the Commission dismissed a petition for rehearing, it appearing that no new evidence had been submitted in support of the petition, which rested wholly upon arguments questioning the legal effect of the facts previously presented and already considered. *Ibid.* 953-957.

²² *Report of the American Commissioner*, Annex A, pp. 29, 32-34.

Girard National Bank case] but to the principle itself.”²³ The latter ground was in itself sufficient to establish that, in passing upon the petition in the *Sabotage* cases, the Commission did not consider itself bound by the rules stated in the *Philadelphia* case.

A statement in the opinion of the Commission in an earlier case, the *Lehmann* case, lends support to the American Commissioner's view that a case might be reheard on the basis of newly discovered evidence. In passing upon the petition for rehearing, the Commission after stating that there was nothing in the petition not considered in deciding the case said:

“For obvious reasons this Commission cannot reopen a case to consider evidence presented after its submission and the rendition of a final decree, *especially where no reason is assigned for not presenting such evidence earlier.*”²⁴ [Italics added.]

Considering the italicized statement in conjunction with the practice of the Commission in examining the newly presented evidence in such cases, it would not be an unreasonable inference that the Commission considered that it would have the power to grant a rehearing in any case in which it should be found that the new evidence was of a character to exercise a decisive influence on its opinion; and that an adequate showing was made that it could not, by the exercise of reasonable care, have been produced before the issuance of the final decree.²⁵

Section 98. The Same: United States-Mexican Mixed Claims Commission of 1868. Both the Umpires of this Commission refused

²³ *Ibid.*, Annex B, pp. 39, 43, 45.

²⁴ *Administrative Decisions and Opinions*, etc. (1926) 842.

²⁵ In this respect the following observations made by the American Commissioner in concluding his opinion of June 21, 1933, in the *Sabotage* cases seem pertinent:

“The Commission cannot announce in advance any general rule as to how this right will be exercised [to reconsider a previous decision] because that would depend in each case on whether or not the facts presented satisfied the Commission that in its discretion the right should be exercised.

“This procedure is consistent with the course hitherto followed by the Commission in dealing with rehearing petitions. Any other course would amount to criticism and repudiation of its previous action. Unless the Commission had the right to reconsider a decision, it was absolutely without justification for hearing two extensive and very expensive re-arguments in the sabotage cases, which have prolonged the life of the Commission for upwards of two years, at considerable expense to both Governments and, incidentally, great added expense to the American claimants in procuring the new evidence submitted. In the opinion of the American Commissioner the Commission would not, and should not, have adopted that course unless the Commission believed it is authorized to revise its decision in these cases if the new evidence and arguments presented justified that action.” *Report of the American Commissioner*, Annex B, pp. 50-51. These observations would seem equally applicable if the newly discovered evidence should be of a decisive character, not previously available, and yet not of a character to show fraud.

to grant rehearings in cases in which final decrees had been issued, although Umpire Lieber does not appear to have passed upon the question as a matter of jurisdiction.²⁶ Umpire Thornton, on the other hand, after mature deliberation, held that he was absolutely without power to rehear a case in which he had rendered a final decision. He disposed of motions for rehearings in several cases in a single opinion of October 20, 1876.²⁷ He referred to the provisions in the Convention that the Umpire should, after having examined the evidence adduced for and against the claim, and after having heard the parties, decide upon it finally and without appeal, and that the contracting parties agreed to accept the decisions as final and without appeal. From this he concluded that he was called upon to examine and decide the claims precisely as they were sent to him, and to peruse no more and no fewer documents, statements, or testimonies than had been before the Commissioners. This he declared he had done, and added:

"It cannot be doubted that he had no right whatever to examine or take into consideration evidence other than that which had already been before the Commissioners, had been examined by them and transmitted to the Umpire. If he had done so, such a course would have been contrary to the dictates of the Convention, and would have been eminently unjust until the opposite side should have had an opportunity of rebutting such posthumous evidence. If then it were in the power of the Umpire to re-hear any of the cases which have now been returned to him, he could only re-examine the same documents and evidence, and no more, upon which he has formed his opinions. As he has already examined all these documents and evidence with all the care of which he is capable, it is not likely that a reexamination of them would tend to alter his opinion."²⁸

He refused, therefore, to consider the effect of any new evidence whatsoever, regardless of the reasons for its production after the decision had been entered.²⁹ As an additional reason for not grant-

²⁶ He refused a motion for rehearing in the *de Lespes* case on the ground that after a reexamination of the whole case, in the light of the argument for a rehearing, no reason appeared for reconsidering his decision. II Moore's *Arbitrations* 1357.

²⁷ *Hale, Latham, Hamneken, Burnap, Weil, La Abra Silver Mining Co., Amat et al., Miller, White, Barco and Garate, and St. John cases*, VI ms. *Opinions* 524-531.

²⁸ *Ibid.* 525. The Umpire rendered a separate opinion in the *Pradel* case refusing to reconsider his decision. VI ms. *Opinions* 552. Cf. *infra*, sec. 103.

²⁹ In his opinion in the case of the bark, *Emily Banning*, however, the Umpire indicated a procedure by which action amounting to a rehearing might have been obtained, if taken in time. The Mexican Agent referred to certain evidence which had been received too late to be laid before the Commissioners, and asked the Umpire to receive it or else to return the case to the Commissioners in order that they might decide whether it should be admitted. He refused to take either course but said: "On the contrary he considers that it was the duty of the agent to ask for the admission by the

ing rehearings, the Umpire pointed out that since, without consulting him, the decisions had been made public, with the understanding that they were final, serious prejudice might result from their alteration.³⁰

The Commissioners do not appear to have entertained views similar to those of Umpire Thornton with reference to their authority to rehear cases on the basis of new evidence. In rendering the opinion for the Commission in the *Moore* case, in which the claimant accompanied his petition for a rehearing with "a copy of his naturalization certificate conclusively establishing his American citizenship," Commissioner Wadsworth said:

"Whenever the evidence produced on a motion for a rehearing before this Commission, is of a certain and conclusive character, such as ought undoubtedly to produce a change in the minds of the Commissioners and convince them of petitioner's right to an award, we are disposed to grant the motion and award according to Public law Equity and Justice. If there can be an exception to this practice, it must be where there has been some gross laches of the claimant, or where, to allow the motion, at the time and under the circumstances, injustice would probably be done to the government defending."³¹

In the *Clark* case the Commission entertained a petition for rehearing, declaring it to be its duty "to re-examine the record, the petition and the new proofs." After subjecting the case to a searching reexamination, it rejected the claim for lack of adequate evidence.³²

Section 99. The Same: Other Cases. Motions for rehearing arose in a number of cases before the United States-Spanish Mixed Claims Commission of 1871, and the treatment accorded them appears hardly to have been altogether consistent. In the *Delgado* case after the Umpire had held the claimant to be an American citizen, but refused to rule on the question of damages on the ground that insufficient evidence had been submitted, he overruled a motion by the United States asking leave to submit further evidence. The Commissioners denied a second motion, the American Commissioner saying that the Umpire, having decided this point

Commission of these documents, and if the Commissioners had disagreed and had referred the matter to the Umpire, he would have decided the question. As it is, no mention has been made of this testimony by the Commission, but the Umpire has been requested to give a final decision on the whole case. He has therefore examined the papers which have been presented to him, and will give his final decision thereupon." II Moore's *Arbitrations* 1355, III ms. *Opinions* 334. The Umpire made a similar ruling in the *Wenkler* case. IV ms. *Opinions* 33.

³⁰ II Moore's *Arbitrations* 1329.

³¹ I ms. *Opinions* 538.

³² II ms. *Opinions* 476.

"as the tribunal of last resort for the Commission, and thus made an end of it," he was not at liberty to reverse that decision and grant a rehearing.³³ Baron Blanc denied an application by the American Agent "for a review and reconsideration of the decision of the precedent umpire, M. Bartholdi" in the *Price* case, basing his action on the ground that such a request must be addressed to or come through the Commissioners, and that, as a rule, the decisions of preceding Umpires were definitive. It is not clear on what specific grounds the review was sought.³⁴

However, in the *de Acosta* case, the Spanish Commissioner consented to reopen the case as an act of courtesy, the reopening having been requested by the American Commissioner on the ground that his first examination of the case had been hasty. Both sides submitted new evidence, and on a second submission to the Commissioner, the American Commissioner requested a further expression of views by the Agents. The Commissioners having disagreed on the American Agent's resulting motion for leave to produce further evidence, the motion was granted by the Umpire.³⁵ In the course of his opinion in the case of *Young, Knowlton and Co.* in which he agreed with his Spanish colleagues in rejecting a petition for a second rehearing on the ground of an alleged error of fact in the award, on the ground that precisely the same question had been ruled on by the Umpire in the first rehearing, the American Commissioner said:

"While I do not doubt the power of this commission to grant rehearings in the exercise of a sound discretion for sufficient cause shown, yet it must be a judicial discretion, guided to some extent by precedent, and governed by public law.

"There is alleged error of fact in the statement of grounds for reaffirming his award by the umpire in this case, but it does not follow that these were the only grounds for his award; inasmuch as he distinctly states that 'the evidence in his judgment fails to establish the right of the claimants to any amount beyond the estimated value of the cargo as admitted by the authorities of Cuba. . . .'

"There is no lack of precision in the terms employed by the umpire in making his award; it appears to contain his

³³ III Moore's *Arbitrations* 2196-2198. Subsequently, the claimant submitted his case as a new claim alleging, in part, a different cause of action. The Umpire allowed recovery only as to that part of the claim involving an injury different from that for which indemnity had been denied in the previous case. *Ibid.* 2199-2200.

³⁴ III Moore's *Arbitrations* 2189.

³⁵ *Ibid.* 2187-2188.

honest decision after a full and fair hearing, and therefore belongs to that class of awards which a court of equity will not set aside for error in law or fact."³⁶

The Commissioners adopted this view of their powers in the *Duggan* case in granting a motion by the American Agent to reopen the case for further evidence after it had been closed on both sides.³⁷ Commenting on this action, Moore says: "Arbitrators must necessarily exercise a wide, though sound, discretion in all such cases."³⁸

The British-Mexican Commission declined to reopen the *Santa Isabel Claims* case upon the request of the Mexican Agent, who desired to present the testimony of certain witnesses with reference to a question asked by the President on the last day of the hearings. The Commission said, however, that it would take cognizance of this testimony if reduced to the form of depositions, and that it would reopen the case to permit the Agents to comment upon this evidence.³⁹ In other instances the Commission reopened the cases before a decision had been reached in order to give the Agents an opportunity to make further argument on questions of law, or upon new evidence submitted and accepted after the close of the hearings.⁴⁰

In the *Lazare* case in which Justice Strong acting as sole arbitrator made an award on June 13, 1885, of \$117,500 in favor of the United States against Haiti, petition was made for rehearing by counsel for Haiti soon after the award had been rendered. Justice Strong refused to entertain the petition "solely for the reason," he asserted in a letter of February 18, 1886, to Mr. Preston, the Haitian Minister, that his "power over the award was at an end" when it "had passed from his hands and been filed in the State Department."⁴¹ He stated further in that letter, however, that, although he had verbally denied the petition for rehearing, the newly discovered evidence which had been placed before him by counsel for Haiti was of such a character that it would "materially have affected" his decision had it been presented to him during the hearing of the case, and before his powers under the Protocol had terminated.⁴² Acting in pursuance of a Senate resolution of December 8, 1886, the Secretary of State, Mr. Bayard, sub-

³⁶ *Ibid.* 2184, 2186-2187.

³⁷ *Ibid.* 2201.

³⁸ *Ibid.*

³⁹ *Further Decisions and Opinions*, p. 353.

⁴⁰ *Veracruz Telephone Construction Syndicate* case, *ibid.* 354; *Mexican Tramways Co.* case, *ibid.* 355. Cf. *Coleman* case (United States v. Great Britain), May 8, 1871, Hale's Report (1874) 98-100; "Brief of Great Britain," *Memorials, Demurrers, etc.* (1871), vol. XV, case No. 232.

⁴¹ II Moore's *Arbitrations* 1793, citing Sen. Ex. Doc. No. 64, 49th Cong., 2d sess., p. 43.

⁴² *Ibid.* 1801.

mitted a report to the President on January 20, 1887, recommending that the award should not be enforced.⁴³ The recommendation was rested principally on the alleged newly discovered evidence and upon certain papers in the Department's files not shown to have been laid before the Arbitrator, although mention was also made of certain errors in the award and irregularities in the proceedings.⁴⁴ This report was transmitted by the President to the Senate, and, by the Department of State to Haiti, and accepted by it as a final disposition of the matter.⁴⁵

Section 100. The Same: Conclusions. In view of the limited jurisdiction and tenure of most *ad hoc* tribunals, and in the light of the treaties creating them, the correctness of the conclusion of Justice Strong that, after a tribunal has rendered its decision and been discharged of the duties imposed upon it by the arbitral agreement, it has no authority to entertain a petition for rehearing, can not seriously be questioned. In the absence of a specific reservation of authority to the tribunal, rehearing in such a case can be had only through agreement between the parties.

In the instances in which a number of cases have been submitted to a tribunal, and a rehearing on the basis of new evidence is sought before the tribunal has closed its work, the answer to be derived from controlling legal principles is less certain. On practical grounds there are persuasive arguments to support the view that rehearings should not be allowed simply on the ground of newly discovered evidence. Since the cases as a rule come to trial long years after the event, and the tribunals are liberal in granting additional time for the production and presentation of additional evidence, there can seldom be a valid excuse for failure to produce evidence. Parties to proceedings before claims commissions, in which most such petitions for rehearing would arise, have been careless enough in the production of evidence without being further encouraged by the possibility of recourse to rehearing to remedy their negligence. Then it may be argued that such re-

⁴³ *Ibid.* 1794, 1800. When certain of the newly discovered evidence was placed before Justice Strong by the Department of State, he made to the Department the following oral statement on June 23, 1886:

"In view of these documents, which were not exhibited to me, I am clearly of the opinion that the award ought to be opened; that the government can not afford to press [a] claim not clearly founded in honesty; that if these documents had been presented to me, together with the other affidavits presented to me on the motion to open the award, they would have made a vast difference in the award which I did make. These papers tend to show that the only fault of Haiti was the failure to propose arbitration instead of at once declaring the contract void, the contract having stated that differences should be referred to arbitrators. That not having been done, resort may be had to law to recover such injuries as the claimant may have sustained. Under the circumstances it would seem to me that he could only claim for expenses necessarily incurred by him." *Ibid.* 1804.

⁴⁴ *Ibid.* 1801.

⁴⁵ *Ibid.* 1805.

hearings would only prolong the already unduly prolix and dilatory proceedings of many such tribunals. The necessities of expediency and certainty would render unwise a rule introducing such an element of uncertainty.

On the other hand, it must be remembered that it is generally the design of the parties that the cases submitted to the tribunal should be disposed of definitively, in accord with the provisions of the arbitral agreement, in such a manner as to remove the cases as a source of irritation in their mutual relations. As already pointed out, tribunals have frequently refused to apply technical rules of evidence which might defeat such purpose. They have taken the view that it was not the intent of the parties that any available evidence should be excluded which might throw light on the question in dispute. To deny a rehearing when newly discovered evidence of a decisive character is presented to the tribunal before it has terminated its deliberations would be contrary to this practice and to the design of the parties. The essential intent of the parties in submitting the cases to arbitration should not be defeated by the transitory needs of expedition and expediency.

On the basis of applicable legal principles, the question is not free from difficulty. In municipal procedure a decision duly rendered in accordance with the facts established in the record would not be set aside simply on the basis that new evidence had been discovered after the termination of the proceedings. This is not necessarily decisive since the situation of a municipal court is not entirely analogous to that of an international tribunal in this matter. The latter is seized of a number of cases at one time, frequently of related subject matter, and adjudicates them serially, usually in one session, consisting of a number of hearings or sittings. The cases, it is true, are separate and independent, and not steps in one comprehensive proceeding leading to a final all inclusive lump sum award.⁴⁶ Nevertheless, it is to be doubted whether a tribunal is discharged of jurisdiction and of responsibility in these cases until the date of its final award and adjournment *sine die*.

Nor does the principal consideration relied upon by Justice Roberts in his ruling in the *Sabotage* cases appear to be conclusive, namely, that under the terms of the agreement requiring the consideration of all evidence submitted the Commission was without authority to compel the parties, against their will, to close

⁴⁶ In his opinion of Dec. 15, 1933, in the *Sabotage* cases, Justice Roberts declared it to be his view that the Commission was "a tribunal sitting continuously with all the attributes and functions of a continuing tribunal until its work shall have been closed; and that as such a tribunal it is engaged in the trial and adjudication of a large number of separate and individual cases." *Report of the American Commissioner* (Washington, 1934), Annex E, p. 72.

the proceedings and submit the case to it. Other tribunals acting under similar provisions have not acted upon that assumption. The provision would seem to relate to the reception of evidence within the time limits of normal pleadings, rather than to the power of the tribunal, in its discretion and subject to any provisions in the agreement, to control the time of the closing of the proceedings and the submission of the case. Of course, ultimately the matter must be determined by reference to the terms of the arbitral agreement, and if by its terms the further consideration of a case is specifically precluded after a formal decision, the tribunal would have no choice but to reject new evidence no matter how persuasive it might be.

In the case of an umpire who is required to decide cases on the basis of the record submitted to him by the commissioners, the position taken by Umpire Thornton seems sound in principle. He has limited jurisdiction in such a matter, and not the plenary jurisdiction conferred upon the commissioners. However, it seems fairly clear that the umpire is under no obligation to proceed to a final decision on the basis of the record submitted to him, and that he might either refuse to make a decision on the basis of it, or that he might send it back to the commissioners for a further elucidation. Likewise, it appears that he might, on an application to him for a rehearing, on the basis of newly discovered evidence, refer the application to the commissioners for consideration who might, with his consent, recall the case for further hearings. Umpire Thornton himself intimated that new evidence might appropriately be submitted to him through the commissioners.⁴⁷

In the light of the foregoing considerations, the conclusion seems warranted that, in the absence of a specific provision to the contrary, a tribunal has jurisdiction to grant a rehearing upon the basis of newly discovered evidence of a decisive character at any time before its final adjournment. This comports with the broad authority usually granted to such tribunals to control their procedure in the interest of disposing of the cases in accord with the arbitral agreement and on the basis of the actual facts in the case so as to accomplish a definitive determination of the disputed issues. Furthermore, it is in accord with the principles and the practice developed in the matter of the revision of awards.⁴⁸

⁴⁷ *Emily Banning* case, III ms. *Opinions* 334.

⁴⁸ The Special Mexican Claims Commission established under the Act of Congress of April 10, 1935, followed a unique practice in the matter of the review of its own decisions:

"The Commission introduced two innovations in practice which, it is believed, are unprecedented. After making a tentative decision in all claims, it conducted a review of all cases on its own motion, for the correction of errors and insuring uniformity of decision in similar cases. Secondly, it gave each claimant an opportunity to file a petition for review after being advised of the Commission's findings and tentative award in each claim. It is believed that the petition for review is a development in accordance with modern ideas

Section 101. Fraud: Controlling Principles. As a matter of principle, it would seem clear that a party against whom an arbitral award has been rendered should not be required to comply with its terms if it is found to have been based upon false or fraudulent evidence of a character to exercise a decisive influence on the decision of the tribunal. It is not equally clear, however, how such a party may properly be freed from the obligations of an award thus alleged to be tainted with fraud. Does the award automatically become null upon a unilateral allegation of fraud, supported by substantial evidence, or may the aggrieved party himself judge the sufficiency of his evidence to render the award invalid, or must the question be determined by a rehearing before an international tribunal, or by an agreement between the parties? If international tribunals were permanent in character with a defined and continuing jurisdiction, the question would present no difficulties. In municipal law there is no doubt of the necessity of instituting proper proceedings to have a judgment set aside where it is alleged to have been obtained by the use of fraudulent evidence. Such a thing as automatic nullity is unknown, and the notion of "self-help" in setting aside judicial decisions has long since been discarded in municipal procedure.

The evaluation of evidence is at best an extremely difficult task, and is peculiarly a judicial function. Neither its weight nor its authenticity is often a self-evident matter, capable of unequivocal determination. Obscure and complex questions of fact must of necessity be resolved in nearly every instance of a charge of fraud. Further than this, it is often difficult to determine on what evidence a decision has been based for the reason that it is not unusual for a tribunal to omit in its opinion a statement of the evidence which was decisive in its decision.⁴⁹ For these reasons,

of due process in a situation of this kind, and both innovations were found to be of considerable practical value." Louis W. McKernan, "Special Mexican Claims," 32 *A.J.I.L.* 457, 464 (1938). See also *infra*, sec. 111.

⁴⁹ See, for example, the following statement made by the United States-French Mixed Claims Commission of 1880 which is not typical of the practice of international tribunals, but which does describe a practice too frequently resorted to, especially with reference to the facts and the evidence upon which the decision is based:

"International commissions do not usually give the reasons for their decisions, except when the decision stands upon some principle of law which they think ought to be made known.

"Most of the cases submitted involve only questions of fact, in which the commissioners weigh the evidence, consider the circumstances, the credibility of witnesses, and so decide upon the claim.

"We reserve to ourselves in the most ample manner the right exercised by all international commissions of deciding for ourselves whether to give reasons or not for our decisions, and in the exercise of the right shall regard what is due to the Governments, the claimants, and to the proper despatch of the business of the Commission." *Derbec case*, Boutwell's Report (1884) 156.

a procedure seems of doubtful wisdom which leaves to the party the discretion to resolve unilaterally the effect of a charge of fraud. Mérignhac has recognized the validity of this conclusion, although he holds that corruption or bad faith renders an award null, and that when such corruption or bad faith has been discovered after the tribunal has adjourned, the party should indicate to his opponent the evidence demonstrating it, and announce at the same time that he holds the award to be null and without effect. He says:

"Reason dictates, in effect, that the parties should not be constituted judges of a question in which they are primarily interested. In certain cases we have previously said, the cause of nullity should be evident; but often, doubts are raised in that which concerns it, for example when it is desired to determine whether the arbitrators have acted within the term provided by the compromis; or better the proof of bad faith or of corruption may not be absolutely decisive. . . . It seems that the better procedure would consist, in this case, of establishing a new arbitral tribunal, to which would be deferred a complete new examination of the case."⁵⁰

Section 102. The Same: Conventional Provisions. Unfortunately practice does not seem to offer a decisive answer to the question under consideration. Neither the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, in their sections relating to arbitral procedure, nor the Statute of the Permanent Court of International Justice contain any provisions concerning the nullity of awards. In their provisions concerning revision, no reference is made to revision on the basis of fraudulent evidence, except to the extent that it may be included in newly discovered evidence.⁵¹ Article 27 of the rules of arbitral procedure adopted by the Institute of International Law in 1874 provided:

"The arbitral award is null in case of a null compromis, or of an excess of jurisdiction, or of proved corruption of one of the arbitrators, or of essential error."⁵²

It appears to have been contemplated by the Institute that "essential error" should include such error when caused by the production of false documents. The article as originally drafted read, "or of essential error caused by the production of a false document," the words "caused by the production of a false document" having been dropped by the Rapporteur, M. Rivier, who stated

⁵⁰ *Op. cit.* 318, translation.

⁵¹ For discussion of the provisions concerning revision, see *infra*, sec. 108.

⁵² A. de Lapradelle, *op. cit.*, 2 Rev. de droit int. 26 (1928), translation.

that "he considered that it should be sufficient when it [essential error] should have another cause."⁵³

The Russian draft of an arbitral code presented to the First Hague Conference contained the following provision, relating to nullity, in the first paragraph of Article 26:

"The arbitral award is void in case of a void *compromis* or exceeding of power, or of corruption proved against one of the arbitrators."⁵⁴

This proposal, like that of the Institute, contained no provision concerning the method by which the question of nullity should be determined. Apparently acting upon the theory "that it would be better not to make any reference to grounds of nullity in the convention since it seemed impracticable to reach an agreement upon a method of procedure for determining judicially the existence of nullity when alleged by a party, the Russian proposal was rejected."⁵⁵

Agreements for *ad hoc* arbitrations have seldom, if ever, contained provisions for rehearing upon the ground of the use of false or fraudulent evidence in obtaining an award, although some have contained provision for revision upon this ground.⁵⁶

As to the decisions of international tribunals, it is surprising to find that charges of fraud have so infrequently been pushed to the point of obtaining the setting aside of an award, especially in view of the numerous allegations concerning fraudulent evidence, notably before claims commissions. There appears to have

⁵³ *Ibid.* 25, translation.

⁵⁴ *The Proceedings of the Hague Peace Conferences, The Conference of 1899*, translation of the official texts prepared in the Division of International Law of the Carnegie Endowment for International Peace (New York, 1920) 804.

⁵⁵ James W. Garner, "Appeal in Cases of Alleged Invalid Arbitral Awards," 26 *A.J.I.L.* 126, 129 (1932).

The following colloquy took place during its First Reading by the Committee of Examination:

"Mr. Asser asks whether some power might not be found on which would devolve the duty of declaring the award null, so that so serious a judgment might not be left to arbitrary action or to the initiative of the losing State. If, as he believes, we do not succeed in finding this power, then Mr. Asser is of the opinion that Article 26 should be stricken out.

"The President believes that Mr. Asser's observations should call for the closest consideration on the part of the committee.

"Chevalier Descamps thinks that a great service which a permanent court of arbitration could render would be to act precisely as such a power.

"Mr. Odier thinks that the draft of this article is subordinated to the question as to whether there will be a permanent court or not.

"The President does not think it possible to provide for cases of nullity, without knowing at the same time who will be the judge to pass upon these cases. We cannot, on the other hand, think of imposing the decision of the permanent tribunal upon the parties in questions which they do not intend to submit to this jurisdiction." *The Proceedings of the Hague Peace Conferences, The Conference of 1899, op. cit.* 743.

⁵⁶ *Infra*, sec. 107.

been no instance in modern times of fraud upon the part of a government itself, either in relation to the deliberations of the tribunal, or the production of evidence. Such instances as have occurred in the latter respect consist of fraud upon the part of claimants in providing evidence in support of their claims before claims commissions.

Section 103. The Same: Weil and La Abra Silver Mining Co. Cases. The awards in these two cases amounted to more than a quarter of the total sum of the awards made by the United States-Mexican Mixed Claims Commission of 1868. In the *Weil* case, \$487,810.68 was awarded as indemnity for damages alleged to have been suffered through the wrongful seizure of a large quantity of cotton of which the claimant was the purported owner. The award of \$683,041.32 in the *La Abra* case was for alleged damages suffered as a result of the owners being dispossessed of a mine in Mexico and the seizure of ores by the Mexican authorities.⁵⁷

As previously noted, Umpire Thornton denied rehearings in a number of cases before this Commission, among them being the *Weil* and *La Abra Silver Mining Co.* cases. He held that he was without authority to grant a rehearing even though at the same time he pointed out that the Agent of Mexico had "produced circumstantial evidence which, if not refuted by the claimant, would certainly contribute to the suspicion that perjury has been committed and that the whole claim is a fraud." He added that "if perjury should be proved hereafter no one would rejoice more than the umpire himself that his decision should be reversed and that justice should be done." Of the *La Abra* case he said:

"In the above mentioned case, . . . the Mexican Agent would wish the umpire to believe that all the witnesses for the claimant have perjured themselves, whilst all those for the defense are to be implicitly believed. Unless there had been proof of perjury the umpire would not have been justified in refusing credence to the witnesses on the one side or the other, and could only weigh the evidence on each side and decide to the best of his judgment in whose favor it inclined."

The Umpire indicated his view as to the available remedy by saying that if perjury could still be proved he apprehended that there were "courts of justice in both countries by which perjurers can [could] be tried and convicted," and that he doubted "whether the government of either country would insist upon the payment of claims shown to be founded upon perjury."⁵⁸

It is further to be noted that this was not the first intimation that the Umpire had had that these claims might be tainted with

⁵⁷ II Moore's *Arbitrations* 1324, 1327.

⁵⁸ *Ibid.* 1329. Cf. *supra*, sec. 98.

fraud. The Mexican Commissioner had expressed his opinion vigorously in both cases that the claims were based upon fraudulent evidence, but this perhaps did not carry the conviction that it might have because of the numerous innuendos in his opinions concerning the alleged fraudulent character of the evidence.⁵⁹

In accepting the awards as a "full, perfect, and final settlement" in accordance with Article 5 of the Convention of July 4, 1868, the Mexican Government at the last meeting of the Commission on November 20, 1876, reserved the right "to show at some future time, and before the proper authority of the United States that the claims of *Benjamin Weil* (No. 447) and *La Abra Silver Mining Company* (489) . . . are fraudulent and based on affidavits of perjured witnesses, this with a view of appealing to the sentiments of justice and equity of the United States Government in order that the awards made in favor of the claimants should be set aside."⁶⁰ This reservation having been communicated to the Department of State by the Mexican Government, Mr. Fish stated in his reply that he "must decline . . . to entertain the consideration of any question which may contemplate any violation of or departure from the provisions of the convention as to the final and binding nature of the awards, or to pass upon, or by silence to be considered as acquiescing in, any attempt to determine the effect of any particular award." The Mexican Minister in a note of December 8, 1876, disavowed any intention on the part of his Government of putting in doubt "the final and conclusive character" of these awards, stating that any appeal which Mexico

⁵⁹ *Ibid.* 1324-1325, 1327-1328. After examining the testimony in the *La Abra* case in detail, the Mexican Commissioner declared that most of it evidently was obtained by fraud, and "that the final result of the gigantic claim was nothing." *Ibid.* 1328.

Moore summarizes the relevant part of the Mexican Commissioner's opinion in the *Weil* case as follows:

"The evidence consisted of affidavits of certain persons who said they witnessed the seizure, of others who said they saw the cotton carried toward the Mexican frontier, and of others who said they had heard of the seizure after it had taken place. Neither the papers relating to the purchase of the cotton, nor the vouchers for the expenses incurred in its transportation, nor the certificates of any custom-house entry, nor the draft of any letter, petition, or protest made at the time of the alleged robbery had been produced. It was alleged that they were all lost; but no one could fail to see that it was a very easy matter to replace them if they ever existed. The claimant, said Mr. Zamacoma, placed much stress on the absence of defensive testimony on the part of Mexico. This was a statement which was far from true. Evidence had been forwarded, but it was delayed by the difficulty of obtaining negative proof. It was too late to be admitted under the rule then in force, and the American commissioner had proposed to admit it if the claimant was allowed to rebut it by new evidence. But, in view of the approaching end of the commission, the advantages of such an arrangement would be altogether on the side of the claimant, who would be advised of the weak points in his case and enabled to put in a lot of manufactured documents in the expiring moments of the commission when there would be no possibility of further investigation." *Ibid.* 1325.

⁶⁰ *Ibid.* 1330.

might make to the United States "would not be resorted to as a means of discarding the obligation" binding Mexico, and that should such appeal prove unsuccessful, the Mexican Government would "recognize its obligation as before."⁶¹

Mexico made the payments under the awards as they came due, though still protesting their fraudulent character, and five payments were distributed. Further distribution was suspended in 1881. Mexico in 1880 indicated an intention to bring action in the courts of the District of Columbia against the promoters of these claims to establish their fraudulent character, but dropped the plan upon a statement by the Department of State that "the proposed step was regarded as a distinct departure from the attitude previously taken by Mexico, and as a contradiction of the purpose of the fifth article of the Convention of 1868 which absolutely forbade any attempt on the part of Mexico to obstruct the execution of the Awards."⁶² In the meantime Congress had, in section 5 of the Act of June 18, 1878, requested the President "to investigate any charges of fraud presented by the Mexican Government . . . and if he shall be of the opinion that the honor of the United States, the principles of public law or considerations of justice and equity, require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company . . . should be opened and the cases retried it shall be lawful for him to withhold payment of said awards . . . until such case or cases shall be retried and decided in such manner as the Government of the United States and Mexico may agree, or until Congress shall otherwise direct."⁶³

In pursuance of this request the Secretary of State, Mr. Evarts, after an investigation, held in a report of August 8, 1879, that the United States was under no obligation to reopen these cases and have them retried before an international tribunal, although he said that the matters brought to the attention of the United States by Mexico did "bring into grave doubt the substantial integrity of the claim of Benjamin Weil, and the sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of La Abra Silver Mining company."⁶⁴ He

⁶¹ *Ibid.* 1330-1331.

⁶² *Ibid.* 1336.

⁶³ 20 Stat. 144, 145.

⁶⁴ He gave the following reasons for his conclusion:

"First. I am of the opinion that as between the United States and Mexico the latter Government has no right to complain of the conduct of these claims before the tribunal of commissioners and umpire provided by the convention, or of the judgments given thereupon, so far as the integrity of the tribunal is concerned, the regularity of the proceedings, the full opportunity in time and after notice to meet the case of the respective claimants, and the free and deliberate choice exercised by Mexico as to the methods, the measures, and means of the defense against the same.

"I conclude, therefore, that neither the principles of public law nor con-

recommended that Congress be requested to authorize an appropriate investigation as the executive did not have the means of making one. Congress having failed to act, a convention was concluded with Mexico on July 13, 1882, providing for the rehearing of the cases before an arbitrator, but the Senate finally refused to approve it in a vote taken April 20, 1886.⁶⁵

Two efforts were made by the claimants to compel the Secretary of State through a writ of mandamus to distribute the sums which had been paid by Mexico. The claimants contended, *inter alia*, that the awards vested in the claimants an absolute right to the amounts awarded and that "this right was property which neither the United States alone, nor the United States and Mexico together could take away."⁶⁶ In the course of its opinion in the case of *Frelinghuysen v. Key*, the Supreme Court stated that the provision in the Convention relating to the finality of the awards concerned only the two Governments. It entertained no doubt, it declared, of the right of the United States to treat with Mexico for a retrial, and continued:

"The presentation by a citizen of a fraudulent claim or false testimony for reference to the Commission was an imposition on his own Government, and if that Government afterwards discovered that it had in this way been made the instrument of wrong towards a friendly power it would be not only its right, but its duty to repudiate the act and make reparation as far as possible for the consequences of its neglect, if any there had been. International arbitration must always proceed on the principles of national honor and integrity. Claims presented and evidence submitted to such a tribunal must necessarily bear the impress of the entire good faith of the Government from which they come, and it is not to be presumed that any government will for a moment allow itself knowingly to be made the instrument of wrong in any such proceeding. No technical rules of pleading as applied in municipal courts ought ever to be

siderations of justice or equity require or permit as between the United States and Mexico that the awards in these cases should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same between the United States and Mexico.

"Second, I am, however, of opinion that the matters brought to the attention of this Government on the part of Mexico do bring into grave doubt the substantial integrity of the claim of Benjamin Weil, and the sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of La Abra Silver Mining company, and that the honor of the United States does require that these two cases should be further investigated by the United States to ascertain whether this Government has been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud." II Moore's *Arbitrations* 1334-1335.

⁶⁵ *Ibid.* 1337-1339.

⁶⁶ *Frelinghuysen v. Key*, 110 U.S. 63, 70-71 (1884).

allowed to stand in the way of national power to do what is right under all the circumstances."⁶⁷

It declared that as between the United States and the claimants the honesty of the claims was always "open to inquiry for the purpose of fair dealing with the Government against which . . . a claim has been made," held that withholding the payments was a discretionary power of the United States not subject to judicial control, and denied the petition for the writ.⁶⁸ This decision was reaffirmed in the case of *United States ex rel. Boynton v. Blaine*, the Court declaring in addition that the action of the Senate in refusing to approve the Convention for a rehearing did not affect the discretionary power of the President.⁶⁹

Finally, by two acts of December 28, 1892, Congress amended the act of June 18, 1878, authorizing the Attorney General to bring suit in the Court of Claims to determine whether these awards had been obtained by fraud, and providing for the return to Mexico of the funds remaining in the hands of the United States should the claims be found to be fraudulent.⁷⁰ In both of the cases instituted in pursuance of these acts, the Court of Claims held that the awards had been obtained as to the whole sum involved "by fraud effectuated by means of false swearing and other fraudulent practices," and entered decrees barring and foreclosing all claims in "law and equity" on the part of the claimants, their agents, attorneys, or assigns to the money received from Mexico in payment of the awards.⁷¹ In affirming the decision in the *La Abra* case, the Supreme Court declared that the effect of the act of December 28, 1892, was "to strengthen the principle that an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned, and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself." The Court added that by that act the United States had declared "that its citizens shall not through its agency reap the fruits of a fraudulent demand which they had induced it to assert against another country."⁷²

On March 28 and November 10, 1900, the United States returned to Mexico the amounts remaining in its hands of the payments made by Mexico in the *La Abra* and the *Weil* cases, respec-

⁶⁷ *Ibid.* 73.

⁶⁸ *Ibid.* 76.

⁶⁹ 139 U.S. 306, 325 (1890).

⁷⁰ 27 Stat. 409, 410.

⁷¹ *United States v. La Abra Silver Mining Co. et al.*, 32 Ct. Cls. R. 462 (1897); *United States v. Alice Weil et al.*, 35 Ct. Cls. R. 42 (1900). For decision in the former case overruling a demurrer on the ground that the act conferring jurisdiction on the Court of Claims was unconstitutional, see 29 Ct. Cls. R. 432 (1894).

⁷² *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899).

tively.⁷³ Subsequently, under an act of February 14, 1902, an appropriation was made to repay to Mexico the money which had been distributed to the claimants.⁷⁴

Section 104. The Same: The Sabotage Cases. The United States-German Mixed Claims Commission of 1922 has reached a different conclusion from that of Umpire Thornton as to its power and duty in the matter of granting a rehearing in the event of an allegation of fraud supported by substantial evidence. It will be recalled that the petitions of the American Agent for a rehearing in that case, filed on January 12 and 22, 1931, were denied. The petitions alleged that the Commission had misapprehended the facts and committed errors of law. The American Agent filed a supplementary petition for rehearing on July 1, 1931, upon the basis of newly discovered evidence. The national commissioners having disagreed both on the question of the jurisdiction of the Commission to entertain a petition for a rehearing after a formal decision in a case, and upon the effect of the new evidence produced, the Umpire in his opinion of December 3, 1932, first examined the new evidence and, having found it insufficient to change the original findings in the opinion of October 16, 1930, stated that it was unnecessary to pass upon the question of jurisdiction.

On May 4, 1933, a further petition for rehearing was filed by the American Agent which averred:

"(1) 'That certain important witnesses for Germany, in affidavits filed in evidence by Germany, furnished fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the cases of the claimants,' (2) 'That there are certain witnesses within the territorial jurisdiction of the United States,' some of whom are specifically named in the petition, 'who have knowledge of facts and can give evidence adequate to convince the Commission of the liability of Germany for the destruction of the Black Tom Terminal and the Kingsland plant, but whose testimony cannot be obtained without authority to issue subpoenas and to subject such witnesses to penalties for failure to testify fully and truthfully,' (3) 'That evidence can be produced 'to show that the Commission has been misled by the German evidence,' (4) 'That there has also come to light evidence of collusion between certain German and American witnesses of a most serious nature to defeat these claims.' " ⁷⁵

⁷³ 1900 For. Rels. 781-784.

⁷⁴ Mr. Hay, Secretary of State, to the Mexican Ambassador, No. 223, March 6, 1902, printed in *Orinoco Steamship Co. case, Counter Case of the United States* (Washington, 1910), Appendix, pp. 92-93.

⁷⁵ *Report of the American Commissioner* (Washington, 1934), Annex E, p. 67. For a discussion of the right to a rehearing in these cases with reference to newly discovered evidence, see *supra*, sec. 97.

In his opinion of December 15, 1933, Umpire Justice Roberts, while holding that a rehearing could not be granted merely on the ground of "after-discovered" evidence, said with reference to this petition that it averred, in short, that the Commission had been "misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them," and continued:

" . . . The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

"I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand." ⁷⁶

⁷⁶ *Ibid.* 75-76. The unanimous opinion of the Commission of June 3, 1936, setting aside the opinion of Dec. 3, 1932, indicates that the evidence of fraud and collusion relates to the genuineness of certain documents, especially the so-called Herrmann Message. (See *supra*, p. 290.) The claims had been dismissed in the opinion of Oct. 16, 1930, essentially because of the failure of the evidence to establish to the satisfaction of the Commission, (1) in the *Kingsland* case that Wozniak had started the fire under the direction of Herrmann, and (2) in the *Black Tom* case that the fire had been caused by any German Agent, though it was not attributed to Hinsch and Kristoff. The Herrmann Message was a message alleged to have been forwarded from Herrmann in Mexico to Hilken in Baltimore in April, 1917, and was written in code in lemon juice upon four printed pages of a Blue Book magazine of the January, 1917 issue, the writing running crosswise of the print. This document was filed in evidence by the American Agent on July 1, 1931, having been produced by Hilken, who in an affidavit of May 8, 1931, stated that he had only recently discovered it in his old home in Baltimore. With reference to the effect of this message, if authentic, the Umpire said in his opinion of Dec. 3, 1932:

"A glance through this translation will indicate that, without reference to any other evidence, it is conclusive proof to any reasonable man that (a) Herrmann and Hilken knew the Kingsland fire and the Black Tom explosion were the work of German agents and (b) that Hinsch, Hilken and Herrmann, undoubted agents, were privy thereto, and (in the light of the record before the Commission) (c) that Kristoff and Wozniak were active participants in these events. As the American Agent has well said, I may utterly disregard all the new evidence produced and still, if I deem this message genuine, hold Germany responsible in both of the cases." *Administrative Decisions and Opinions, etc.* (1933) 1016.

After reviewing in minute detail the evidence relating to the genuineness of this document, the Umpire concluded:

"I need only add in summary that the most careful study and consid-

The Umpire accordingly held that the case should be reopened in order that it might consider the new evidence offered.⁷⁷

The American Commissioner, as previously indicated, held broadly that the Commission had full discretionary power to rehear cases on the ground of new evidence not previously available, as well as on the ground of evidence "showing misrepresentation or fraud as to the facts or the suppression of material evidence, or that the Commission has otherwise been imposed upon." He added, however:

"This right to reconsider should be applied only to a limited and special class of cases. It may be noted, however, that the Commission, by its previous careful and well-considered action in dealing with matters intrusted to its discretion in these proceedings, has abundantly demonstrated that it will not abuse its discretionary powers in dealing with reopening petitions. It will be recalled that it has not as yet granted any such petition. It may also be noted that the American Agent has effectively cooperated with the Commission in its efforts to complete the work of the Commission as promptly as possible, by refusing, on his own responsibility, to present several hundred applications for rehearings which he considered were not well-founded."⁷⁸

The German Commissioner denied entirely the right of the Commission to reopen a case after a formal decision, and made no distinction with reference to the matter of fraud.⁷⁹

Section 105. The Same: The Gardiner Case. Although involving no actual rehearing, this case is of interest here because of the

eration of the expert evidence with respect to the Blue Book message convinces me that upon that evidence alone I should not be justified in affirming the authenticity of the document. I am therefore compelled to revert to the other evidence.

"As has been indicated, the testimony offered on both sides with respect to the message, to say the least, raises grave doubts with regard to it. The sources from which it comes, the circumstances of its production, the evidence as to the time and circumstances in which it was written, and the silent but persuasive intrinsic evidence which is drawn from its contents, make impossible an affirmative conclusion in favor of the claimants and against Germany. The claimants have the burden to establish, by fair preponderance of evidence, that this document was written and sent at the time claimed. With every disposition to avoid technicality, to be liberal as to the interpretation and effect of evidence, and to regard the great difficulties under which the claimants have labored in the production of their proofs, I yet find myself unable to overcome the natural doubts and misgivings which cluster about this document. I am not, therefore, prepared to make a finding that this is the missive which Herrmann dispatched to Hilken in 1917." *Ibid.* 1027-1028.

⁷⁷ This, in effect, modified the ruling on "after-discovered" evidence to the extent that such evidence may warrant a rehearing if it shows fraud or collusion.

⁷⁸ *Report of the American Commissioner*, Annex B, p. 50.

⁷⁹ *Ibid.* Annex A, pp. 29-38.

procedure followed by the United States in investigating the charge that an award of a commission established under domestic law had been obtained through forged and fraudulent evidence. The Board of Commissioners established in pursuance of the treaty of Guadalupe Hidalgo of February 2, 1848, and under the act of March 3, 1849, made an award of \$428,747.50 to Gardiner for losses alleged to have been suffered through the wrongful destruction of valuable mining properties in Mexico.⁸⁰

Serious charges of fraud having been advanced against Gardiner and his associates, committees of investigation were appointed both by the Senate and the House. The House Committee found that the claim had been "sustained before the commissioners by false testimony and forged papers" and that it was "a naked fraud upon the treasury of the United States," but absolved the Secretary of the Treasury of any complicity in the fraud.⁸¹ The Senate Committee sent a commission to Mexico to investigate the case on the spot. In summing up its report, this Commission declared that the whole claim had been fabricated, having absolutely no foundation in fact. It asserted that Gardiner never had owned or been interested in any mine in Mexico, and said that "every paper presented by both . . . Gardiner and Mears [one of Gardiner's confederates who obtained and sent false papers from Mexico] as coming from Mexico in support of their claims," was "false and forged."⁸² The Senate Committee held in its report that the award had been made upon "fraudulent, forged, and fictitious papers."⁸³

Gardiner was indicted, tried and convicted on charges of forgery and false swearing, sentenced to ten years imprisonment, and immediately committed suicide. Through two actions instituted against Dr. Gardiner in the circuit courts in Washington and New York, and against firms holding certain money and securities belonging to him, the United States recovered in all about \$250,000.⁸⁴

⁸⁰ II Moore's *Arbitrations* 1255, 1256-1257.

⁸¹ H. Rep't. No. 1, 32d Cong., 2d sess., pp. 6, 8.

⁸² Sen. Rep't. No. 182, 33d Cong., 1st sess., p. 149.

⁸³ *Ibid.* 3. Both Committees criticized the Commission on the ground of laxity in its investigation of the case, the Senate Committee going so far as to say:

"The Committee are also of opinion that there was palpable carelessness and neglect upon the part of the Commissioners in some of the cases, especially in those of Gardiner and Mears. The fact of an amount exceeding \$500,000 being awarded upon a mere assertion of title, without any effort being made either by the parties to produce the title, or to show its loss or destruction, or on the part of the Commissioners to require such production, or proof of such loss or destruction, they being authorized to require it, is evidence of want of attention, if not of gross neglect."

⁸⁴ II Moore's *Arbitrations* 1260-1261.

Section 106. The Same: Conclusions. Justice Roberts stated a sound rule in the *Sabotage* cases when he held that such a tribunal as the United States-German Mixed Claims Commission has authority at any time before the expiration of its life to reopen a decision and grant a rehearing upon a substantial showing of fraud in the matter of evidence. As he well points out, so long as the tribunal is not *functus officio*, "if it may correct its own errors and mistakes, *a fortiori* it may . . . correct errors into which it has been led by fraud and collusion." Umpire Thornton appears to have misconceived the limitations placed upon his powers by the arbitral agreement. It could hardly have been the intention of the contracting parties to put the Umpire in the invidious position of refusing to listen to a petition for reconsideration when, as he himself said, the new evidence "if not refuted by the claimant, would certainly contribute to the suspicion that perjury has been committed and that the whole claim is a fraud."

As to the situation in which the evidence of fraud appears after the tribunal has ceased to exist, the matter is one calling for settlement between the parties, unless in contemplation of such an eventuality, provision has been made in the arbitral agreement for further recourse to judicial settlement, either before the same tribunal, or before a newly constituted tribunal. An allegation of fraud in the production of evidence is essentially a question for judicial determination in a forum common to the parties. Such a procedure was not followed, however, in the *Weil* and *La Abra* cases. The charges of fraud were adjudicated in the courts of the United States in proceedings prosecuted by the United States against the offending individuals. The United States refused to entertain any suggestion that Mexico had a right to avoid the awards because of the alleged fraud. In effect, the United States maintained the continuing validity of the awards, subject to their being modified by mutual agreement, by a rehearing before an international tribunal, or by unilateral investigation by the proper authorities in the United States. Mexico acquiesced in this view, going so far as to say that any appeal which Mexico might make "would not be resorted to as a means of discarding the obligation" binding Mexico. In the *Gardiner* case, which had been adjudicated by a domestic commission established by the United States, after Congressional investigation of the charges of fraud, the United States resorted to judicial action in its own courts to recover the sums already paid. However, it is fairly certain that if the fraud had been discovered before the payments had been made, the decision of the Commission would only have been set aside after judicial determination of the effect of the fraudulent evidence.

The *Sabotage* cases relate to a situation in which the allegations of fraud were raised before the tribunal had adjourned, but

the problems which have confronted the Commission in that case illustrate graphically the difficulties involved in weighing charges of fraud. After having once examined the allegedly fraudulent evidence and held it to be insufficient to affect the decision, the Commission has since reconsidered that conclusion and set its former decision aside. It has yet to examine whether the new evidence is sufficient to warrant reopening the case, and if it is, then whether the charges of fraud are substantiated by the new evidence considered in connection with the old. This is a complex question, and obviously of a character to require judicial determination. In the *Weil* and *La Abra* cases, Mr. Evarts, Secretary of State, recommended a judicial investigation of the charges of fraud asserting that the executive did not possess the means for prosecuting a proper investigation.

This reveals the unsatisfactory character of the available remedies in the event of an allegation of fraud. The only alternative to judicial settlement is a settlement through the channels of diplomacy. If that fails, the party against whom the decision was rendered, has no recourse but to refuse to comply with the award if it is convinced that essential fraud exists. Unsatisfactory as such a situation may be, it appears that a party would be within its rights in taking such action. Although the writers are not in agreement on the effect of fraud, a majority hold, apparently, that, in general, fraud renders an award automatically null and void.⁵⁵

⁵⁵ For writers holding that fraud (having reference either to fraud, in general, or specifically to fraudulent evidence) automatically renders the award null and void, see Chrabro Wassilewski, cited in L. Kamarowski, *Le tribunal international* (Paris, 1887) 348; Bulmerincq, cited in Kamarowski, *op. cit.* 358; *Project of Rules for International Arbitral Tribunals*, Art. 32, par. 11, presented by Goldschmidt to the Institute of International Law in 1874, 1874 Rev. de droit international et de leg. comp., vol. VI, pp. 421, 446-447; Oppenheim, *International Law*, (London, 1935), 5th ed. (Lauterpacht), vol. II, pp. 27-28; Heffter, *Le droit international de l'Europe*, 3d French ed. (Paris, 1873) 210; Calvo, *Le droit international théorique et pratique*, (Paris, 1888), 4th ed., Vol. III, sec. 1774; Pradier-Fodéré, *Traité de droit international public européen et américain* (Paris, 1894), vol. VI, sec. 2628.

Some writers have not listed fraud among the causes they assign for the nullity of awards: Bluntschli, *Le droit international codifié* (Paris, 1870), sec. 495; Carnazza-Amari, *Traité de droit international public* (Paris, 1882), vol. II, p. 564.

Fiore draws a distinction between causes resulting in automatic nullity and those upon the basis of which the award may be attacked and annulled, and includes in the latter class those which "by virtue of the proof duly furnished, they must be considered as obtained by fraud or violence." *Droit international codifié. Nouvelle édition entièrement refondue, traduite de l'italien par Charles Anotoine* (Paris, 1911), p. 617.

For an exposition of the view that the exceeding of its jurisdiction by a tribunal renders the award subject to nullification by further judicial reference, but not null, see A. de Lapradelle, "L'Exces de Pouvoir de L'Arbitre," 2 Rev. de Droit Int. 5-64 (1928). Cf. statement by the Sub-Committee of the First Committee of the League of Nations Assembly with reference to the proposal of Finland to confer appellate jurisdiction on the Permanent Court of International Justice. League of Nations, Official Journal, Sp. Supp. No. 94, Records of the Twelfth Ordinary Session of the Assembly, (1931), Minutes of the First Committee, p. 140.

In municipal law substantial fraud vitiates a judgment, but its existence must be established by recourse to judicial process. The absence of such recourse in international procedure can not cure the fraud. As Brierly remarks, "there is no warrant in law for saying that unless such a reference [judicial] takes place, . . . the complainant party is without remedy; it is not always true that what ought to be the law is the law."⁸⁶

A situation is plainly unsatisfactory which permits a party to the proceedings to determine the validity of its own allegation of fraud. The remedy lies, however, not in the enforcement of an award obtained by fraud, but in the inclusion in the arbitral agreement of adequate provision for the judicial determination of allegations of fraud. An adequate judicial remedy is now available, namely, the inclusion in the agreement of a provision for the reference of such questions to the Permanent Court of International Justice.

REVISION

Section 107. Bilateral Treaties. Although it has not been the general practice to include provisions concerning the revision of awards in bilateral arbitration treaties, there are a few instances of treaties with such provisions. Apparently, the first treaty containing provision for revision was that of July 23, 1898, between Italy and the Argentine Republic. That treaty while providing in Article 13 that there should be no appeal from the award, its execution being confided to the honor of the signatories, contained this additional provision:

"The revision of the award before the same Tribunal which has pronounced it may be asked for before the execution of the sentence: First, if the judgment has been based upon a false or erroneous document; and, second, if the decision in whole or in part has resulted from an error of fact, positive or negative, resulting from the acts or documents of the trial."⁸⁷

Substantially similar provisions were contained in a number of general arbitration treaties concluded between various Latin American Republics.⁸⁸ The Bolivian-Peruvian treaty of November 21,

⁸⁶ "The Hague Conventions and the Nullity of Arbitral Awards," 1928 Br. Yearbook of Int. Law, 114, 116. Cf. H. Lauterpacht, "The Legal Remedy in Case of Excess of Jurisdiction," *ibid.* 117.

⁸⁷ Darby, *International Tribunals* (London, 1900), 3d ed., pp. 214, 218. This provision though less elaborate may have been derived from the *Project of Rules for International Arbitration* drafted by the Italian jurist, Prof. Corsi. See Arts. 40(b), (c), 41, *ibid.* 318-320.

⁸⁸ Brazil-Chile, May 18, 1899, Art. IX, Manning, *op. cit.* 261; Argentina-Uruguay, June 8, 1899, Art. XVI, *ibid.* 265; Argentina-Paraguay, Nov. 6, 1899, Art. XVI, *ibid.* 287; Bolivia-Peru, Nov. 21, 1901, Art. XII, *ibid.* 299; Argen-

1901, placed a limit of six months upon the time within which revision must be sought, and under the Brazilian-Argentinian treaty of September 7, 1905, the appeal for revision must be made before the execution of the sentence.

Section 108. Provisions in Multilateral Treaties. The provision in Article 54 of the Hague Convention of 1899 for the Pacific Settlement of International Disputes that the arbitral award "duly pronounced and notified to the Agents of the disputing parties" should "decide the question at issue finally and without appeal," was qualified by the following article:

"Article 55. The Parties can reserve in the *compromis*, the right to demand the revision of the award.

"In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact which is of a nature to exercise a decisive influence upon the award and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision.

"Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

"The *compromis* fixes the period within which the demand for revision must be made."⁸⁹

This provision was included in the Convention upon the initiative of Mr. Holls of the American delegation. The Russian Draft of an arbitral code presented to the Conference at the opening of its sessions, and which served as the original basis of discussion, made no provision for revision, but did provide in Article 26 that the arbitral award should be "void in case of a void *compromis* or exceeding of power, or of corruption against one of the arbitrators."⁹⁰ As previously indicated, this provision was dropped, but was discussed in connection with the proposal on revision.⁹¹ The plan for an International Tribunal presented by the American delegation contained the following provision:

"(7) Every litigant which shall have submitted a cause to the international tribunal shall have the right to a re-

tina-Bolivia, Feb. 3, 1902, Art. XVI, *ibid.* 319; Argentina-Chile, May 28, 1902, Art. XIII, *ibid.* 331; Argentina-Brazil, Sept. 7, 1905, Art. XVII, *ibid.* 360; Bolivia-Brazil, June 25, 1909, Art. XVII, *ibid.* 445; Brazil-Peru, Dec. 7, 1909, Art. XVI, *ibid.* 453.

⁸⁹ II Malloy's *Treaties* 2029.

⁹⁰ *The Proceedings of the Hague Peace Conferences, The Conference of 1899*, *op. cit.* 801.

⁹¹ *Supra*, pp. 301-302.

examination of its case before the same judges, within three months after the notification of the decision, if it declare itself able to invoke new evidence or questions of law not raised or settled the first time." ⁹²

When the provision concerning the finality of awards came up for consideration in the Committee of Examination, Mr. Holls asked that this provision from the American Plan be discussed as an amendment, changing the time limit to six months. He said that this proposal did not affect the finality of the award, but was intended merely to provide for the discovery of a new fact. He added that such a discovery could not be treated as not having been made as it might "completely modify the situation which was before the arbitrators." ⁹³ After considerable discussion, the following text covering this proposal was adopted by the Committee and reported to the Third Commission:

"The parties can reserve in the *compromis* the right to demand the revision of the award.

"In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact which is of a nature to exercise a decisive influence upon the award and which, at the time the tribunal entered its decree, was unknown to the tribunal and to the party demanding the revision.

"Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

"No demand for revision can be received unless it is formulated within three months following the notification of the award." ⁹⁴

⁹² *The Proceedings of the Hague Peace Conferences, The Conference of 1899, op. cit.* 834.

⁹³ *Ibid.* 749.

⁹⁴ *Ibid.* 857. A somewhat different text was proposed by M. Asser:

"The parties can reserve in the *compromis* the right to demand the revision of the award.

"In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award and only on the ground of the discovery of some new fact which is of a nature to exercise a decisive influence upon the award and which, at the time the tribunal entered its decree, was unknown to the tribunal and to the party demanding the revision.

"Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

"No demand for revision can be received unless it is formulated within six months following the notification of the award." *Ibid.* 857.

This proposal was vigorously opposed by M. Martens who declared that "it would be most unsatisfactory and unfortunate to have an arbitral award . . . subject to reversal by a new judgment." The "end of arbitration" he considered to be "to terminate the controversy absolutely." Further he asserted:

"The great utility of arbitration is in the fact that from the moment when the arbitral judgment is duly pronounced everything is finished, and nothing but bad faith can attack it. Never can an objection be raised against the execution of an arbitral award."⁹⁵

Mr. Holls replied that the proposal had the "eminently practical" purpose, which was "extremely desirable and even necessary" of providing "for the possibility of rectifying evident errors, in a regular and legal manner, without incurring the danger of having the decision repudiated by the aggrieved party." He thought that M. Martens exaggerated the uncertainty that would result from the provision. New facts could not "be forged nor manufactured, at least not by civilized Governments," he asserted, and every Government would "hesitate to expose its country to the humiliation which would undoubtedly attach to an unsuccessful attempt for a rehearing of the litigation upon a pretended discovery of new facts, the existence of which would be denied by the tribunal."⁹⁶

M. Asser pointed out that this was not a question of appeal but of an exceptional case in which a new fact has been discovered. He said his proposal was intended to save the principle of revision while meeting the wishes of those who did not wish to weaken *a priori*, by means of a treaty provision, the moral force of arbitral awards. The wording proposed did "not imply a right of revision as a natural consequence in every arbitration case," but it allowed "the parties to reserve this right expressly and, if they do, it fixes the rule and procedure to be followed."⁹⁷

Upon the proposal of Baron Bildt and Chevalier Descamps the clause in the second paragraph "when the tribunal decided the case" was amended to read "and which, at the time the discussion was closed." This was intended to take care of a case in which important new evidence might be discovered after the close of the hearings and before the decision of the case, there being no opportunity to bring it before the tribunal.⁹⁸ As thus amended the text was adopted.⁹⁹

During the discussion of the revision proposal in the Committee of Examination, Sir Julian Pauncefoot observed that re-

⁹⁵ *Ibid.* 618-619.

⁹⁶ *Ibid.* 620-621.

⁹⁷ *Ibid.* 618.

⁹⁸ *Ibid.* 679.

⁹⁹ *Ibid.* 149-151, 156, 165.

vision could not be demanded except in cases where new documents had been discovered and inquired whether this included fraud. Mr. Holls replied that fraud evidently constituted "a case of nullification and a *new fact*," and that the draft of M. Asser should be so understood. No objection was offered to this interpretation of the text.¹⁰⁰

When Article 55 of the Convention of 1899 came up for consideration in the First Subcommission of the First Commission of the Second Hague Conference of 1907, M. Martens, for the Russian delegation, proposed its suppression.¹⁰¹ There was a virtual unanimity of opinion in opposition to this proposal, the principal statement being made by M. Ruy Barbosa who said, in part:

"Very far from being contrary to the nature of arbitration, revision is of its very essence. To make this evident, it will suffice to recall that even in private law, in civil procedure, it is everywhere admitted, and to such an extent that, under certain legislations, any clause by which the parties might renounce such right is declared as null and void.

"Now if in arbitration within the field of private law, when the dispute takes place between one individual and another individual, the remedy of revision is a right generally guaranteed to the victims of sentences tainted with essential faults, it is manifest that, *a fortiori*, such remedy cannot be denied, when the parties are nations, States, sovereignties."¹⁰²

¹⁰⁰ *Ibid.* 753.

¹⁰¹ M. Martens referred to the recommendations concerning arbitral procedure made by the Tribunal in the *Pious Fund* case. Concerning the provision for revision in Art. 55 of the 1899 Convention, the members of the Tribunal said in their letter of Oct. 14, 1902, to the Netherlands Minister for Foreign Affairs, speaking with special reference to the provision that the compromis should determine the period within which a demand for revision may be made:

"This stipulation may, in practice, provoke very grave inconvenience.

"If the period within which the demand for a revision is admissible be very short (as that stipulated in the above mentioned Protocol of Washington of the 22nd of May, 1902), it will very rarely happen that a new fact, giving rise to a revision will be discovered in time.

"If, on the contrary, a rather long period be stipulated, or if the right be accorded of demanding a revision at any time, the obligatory force of the arbitral verdict will remain for a long time or forever in suspense.

"This does not seem to be at all desirable.

"In fact the arbitral verdict will almost always provoke discontent in one of the parties.

"If this feeling be not appeased in the shortest possible time by reason of the *chose jugée* or of the *fait accompli* the conflict between the nations in litigation may assume an acute character endangering international peace.

"Hence the undersigned express the opinion:—

"That in the compromis the smallest possible use be made of the power accorded by Article LV of The Hague Convention." 5 *A.J.I.L.*, Supp. 77-78 (1911).

¹⁰² *The Proceedings of the Hague Peace Conferences, The Conference of 1907, op. cit.* vol. II, pp. 369-371.

Without debate the First Commission voted to retain the article which became Article 83 of the Convention of 1907.¹⁰³

A provision derived largely from the foregoing articles was embodied in Article 61 of the Statute of the Permanent Court of International Justice:

"An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

"The proceedings for revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

"The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

"The application for revision must be made at latest within six months of the discovery of the new fact.

"No application for revision may be made after the lapse of ten years from the date of the sentence."¹⁰⁴

A significant modification in this article as compared with the Hague Convention provisions was the inclusion in the first paragraph of the proviso that ignorance of the new fact was "not due to negligence." This is a salutary requirement as revision should never be open to parties as a means of curing defects resulting from their own negligence.¹⁰⁵ According to Hudson, the third paragraph was added because of the fear that a party might delay the execution of the sentence until the expiration of the period provided for an application for revision.¹⁰⁶ It is to be observed that the first paragraph does not require that the fact upon which the application is based be a *new* fact. The fourth paragraph, however, speaks of the "discovery of the new fact." This paragraph, says Hudson, was added by a narrow vote upon the proposal of the Canadian delegation (to the League of Nations As-

¹⁰³ *Ibid.* 131, 588-589, 731, 757-758. The Convention for the Establishment of an International Central American Tribunal of Feb. 7, 1923 contains a provision in Article I, paragraph 4, evidently modeled after this one. For text, see Appendix VII. See also Appendix VIII for the text of Articles 63-69 of the Rules of this Tribunal concerning revision. These rules contain the unique requirement that the petitioner for revision deposit \$25,000 with the Tribunal, which is to be forfeited in the event that the judgment is affirmed. It is then paid to the other party as compensation for damages.

¹⁰⁴ Cf. Art. 78 of the Court's 1936 Rules, Appendix II.

¹⁰⁵ The provision was included at the suggestion of the Advisory Committee of Jurists. *Procès-Verbaux*, *op. cit.* 744.

¹⁰⁶ Hudson, *Permanent Court*, p. 177.

sembly), though M. Ricci-Busatti of Italy pointed out that "the discovery of the new fact was a very indefinite point of departure."¹⁰⁷

No application for revision has ever been made either under the Hague Conventions or under the Statute of the Permanent Court of International Justice.¹⁰⁸ The Permanent Court has, however, made reference to the matter of revision of awards by other tribunals. During the course of the proceedings in the *Monastery of Saint Naoum* case, the decision of the Conference of Ambassadors, of December 16, 1922, defining the boundary between Albania and the Serb-Croat-Slovene State, having been criticized on the ground that it was based on erroneous information or adopted without regard to certain essential facts, the Court said:

"The Court . . . does not feel called upon to give an opinion on the question whether such decisions can—except when an express reservation to that effect has been made—be revised in the event of the existence of an essential error being proved, or of new facts being relied on. But even if revision under such conditions were admissible, these conditions are not present in the case before the Court."¹⁰⁹

In the course of its advisory opinion in the *Delimitation of the Czechoslovak-Polish Frontier (Question of Jaworzina)* case, the Court declared: "But in the absence of an express agreement between the parties, the Arbitrator is not competent to interpret, still less to modify his award by revising it."¹¹⁰ This statement can hardly be accepted as the definitive opinion of the Court on the subject, however, as it was made incidentally in the course of a discussion of the effect to be given to a letter of November 13, 1922, from the Conference of Ambassadors interpreting their decision of July 28, 1920, dividing the districts of Teschen, Orawa, and Spisz between Poland and Czechoslovakia.¹¹¹ The Court was primarily concerned with the power of the Conference to give an authoritative interpretation of its own decision, after the termination of its authority in the matter, under the terms of reference, with the rendering of its decision. It seems fair to conclude, how-

¹⁰⁷ *Ibid.* 178.

¹⁰⁸ Two requests for the interpretation of judgments have been made to the Permanent Court of International Justice: *Interpretation of Judgment No. 3* [*Treaty of Neuilly, Article 179, Annex, Paragraph 4, Series A, No. 3*], *Series A, No. 4; Interpretation of Judgments No's. 7 and 8* [case concerning *Certain German Interests in Polish Upper Silesia (Merits)*, *Series A, No. 7; Case Concerning the Factory at Chorzow (Claim for Indemnity)* (*Jurisdiction*), *Series A, No. 9*], *Series A, No. 13*.

Hudson points out that Article 66 of the Rules as adopted in 1922 related only to revision, but that it was revised in 1931 to cover interpretation. *Permanent Court*, pp. 283-284. Cf. Article 78, 1936 Rules.

¹⁰⁹ *Series B, No. 9*, pp. 21-22.

¹¹⁰ *Series B, No. 8*, pp. 37-38.

¹¹¹ *Ibid.* 26-27, 36-37.

ever, on the basis of statements in the two cases considered together that the Court would hold a tribunal to be without power to revise an award in the absence of a specific grant of authority in the agreement creating it.

Section 109. General Cases. In considering the authority of international tribunals to revise their awards, it is essential to make two general distinctions. First, revision should be clearly distinguished from the correction of errors or mistakes in awards arising from slips, accidental omissions, etc. In the second place, as in the case of rehearings, it is important to separate the three different situations in which revision may be sought, that is after the close of the hearings but before a decision, after a decision but before the adjournment of the tribunal, and after adjournment and dissolution of the tribunal.

It is accepted as axiomatic that a tribunal may correct errors that may have crept into the award through slips, accidental omissions, miscalculations, or even a failure to take appropriate account of facts appearing in the record.¹¹² In considering the jurisdiction of the United States-German Mixed Claims Commission to entertain petitions for rehearings, Umpire Roberts said in his opinion of December 15, 1933, in the *Sabotage* cases:

"I think it is clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the ap-

¹¹² *Amat* case (United States v. Mexico), July 4, 1868, VI ms. *Opinions* 544 (correction of arithmetical error by Umpire Thornton); *Okie* case (United States v. Mexico), Sept. 8, 1923, *Opinions* (1927) 185 (correction of translation). Accord: *Parker* case, *ibid.* 186; *Faulkner* case, *ibid.* 193. It should be noted that such revisions involve matters of evidence only to the extent that the correction is made by reference to the existing record as established by evidence produced.

Article 75 of the 1931 Rules of the Permanent Court of International Justice provided: "The Court, or the President if the Court is not sitting, shall be entitled to correct an error in any order, judgment or opinion, arising from a slip or accidental omission." Cf. similar provisions in the Ordinance of Procedure of the Central American Court of Justice, Art. 45, Appendix VI.

Hudson calls attention to the fact that when this rule was originally adopted "it was understood that before correcting clerical errors, the Court or the President should ascertain that the parties gave their consent." *Permanent Court*, pp. 287-288, citing Series D, No. 2, pp. 161-221. The rule was never applied in practice, and was dropped when the 1936 Rules were adopted. Cf. paragraph 6 of Art. 40, of the 1936 Rules. Series D, No. 2 (3d Add.), pp. 457-459.

plicable legal rules. My understanding is that the Commission has repeatedly done so where there was palpable error in its decisions."¹¹³

The Anglo-German Mixed Arbitral Tribunal corrected its interlocutory decision in the case of *Mrs. Dewhurst and others v. Etat allemand* to bring the date from which interest on the proceeds of a sale were to run into accord with the date of the death of the wife of the testator. The Tribunal declared that they "must rely upon the parties to put them fully into possession of the facts," and that their attention had not been "called clearly to the fact that Mrs. Briesenmann was alive after the date of the sale of Brockhusen."¹¹⁴

It would seem equally clear, as a matter of principle, that a tribunal has authority to admit evidence of a decisive character discovered after the close of the hearings but before the decision of the case.¹¹⁵ This is not, strictly speaking, a matter of revision, but rather a question of the power of the tribunal to control the time of the admission of evidence, and one which has been previously discussed.¹¹⁶

With reference to the second situation, that is after the decision of the case but before the adjournment of the tribunal, reference has already been made to the ruling of Justice Roberts, Umpire, in his decision of December 15, 1933, in the *Sabotage* cases, that the Commission did not have the power to grant rehearings merely on the basis of newly discovered evidence.¹¹⁷ It

¹¹³ *Report of American Commissioner* (Washington, 1933), Annex E, p. 73. The American Commissioner said in his opinion of June 21, 1933, concerning the same question that the Commission had "always assumed and acted on that assumption, that it was fully empowered to correct any clerical or pro forma errors in its decisions or awards, and that this has been done as a matter of routine procedure." *Ibid.* Annex B, p. 40.

¹¹⁴ 4 *Recueil des décisions* 1 (1924). Accord: *Max Byng v. Der Anker Gesellschaft fur Lebens und Rentenversicherungen, Vienna*, *ibid.* 297 (1924) (Anglo-Austrian Tribunal).

The rules of a number of these Tribunals contained specific provisions concerning the rectification of awards. Article 90 of the rules of the Anglo-Austrian Tribunal is typical:

"Upon application of a party to a cause made within thirty days of the date of delivery of exemplifications of a judgment to the Government Agents, and after giving the other party an opportunity of being heard the Tribunal may interpret or rectify a judgment which is obscure or incomplete or contradictory, or which contains any error in expression or calculation of judgment." 1 *Recueil des décisions* 622, 635. For similar rules, see Anglo-German, Art. 40, *ibid.* 109, 118; Anglo-Bulgarian, Art. 95, *ibid.* 639, 652; Anglo-Hungarian, Art. 90, *ibid.* 655, 668; Austro-Belgian, Art. 75, *ibid.* 171, 181; Franco-German, Art. 78, *ibid.* 54; German-Belgian, Art. 75, *ibid.* 43.

¹¹⁵ *Angarica* case (United States v. Spain), Feb. 12, 1871 (reference to umpire revoked to permit production of new evidence), III Moore's *Arbitrations* 2200; *Buzzi* case (claimant permitted to produce newly discovered evidence of naturalization of his father after reference to umpire), *ibid.* 2200; *Duggan* case (after case closed on both sides, motion granted by national commissioners to reopen for further evidence), *ibid.* 2201.

¹¹⁶ *Supra*, sec. 20.

¹¹⁷ *Supra*, p. 289.

appears, however, that, in at least one case, the national commissioners did allow what amounted, in effect, to a revision on newly discovered evidence. The case of *John F. Hamann, Executor of the estate of Frederick C. Hamann*, was dismissed upon the submission of the American Agent that Frederick C. Hamann had not completed his naturalization. Upon motion of the American Agent, the order of dismissal was set aside, and an award made upon an agreed statement of facts, upon the basis of newly discovered evidence to show that three of the heirs of Hamann were native born American citizens.¹¹⁸

Revision of an award was made by Umpire Thornton in one case, the *Schreck* case, before the United States-Mexican Mixed Claims Commission of 1868, in which the Agent of the United States produced the text of a Mexican law to show that the Umpire had been wrong in presuming that the claimant acquired Mexican citizenship by the mere fact of birth in Mexican territory. The Umpire declared that "no new evidence was offered or taken into consideration." This was not strictly accurate as the copy of the law produced by the American Agent constituted proof of that law.¹¹⁹

Section 110. Decisions of the Mixed Arbitral Tribunals. The most important body of practice in the matter of revision under these circumstances is that to be found in the proceedings of the Mixed Arbitral Tribunals created under the Treaty of Versailles. The rules of most of these Tribunals specifically provided both for revision and rectification of awards, and the power to take such action was affirmed in a number of cases. Article 91 of the rules of the Anglo-Austrian Mixed Arbitral Tribunal are typical of the rules of the various tribunals concerning revision:

"Within six calendar months from the date of delivery of exemplifications of a judgment to the Government Agents, any party may deliver to the Tribunal a demand for the revision of the judgment on the ground of the discovery of evidence which, if known to the Tribunal when the cause was before it previously, would have exercised a decisive effect upon its judgment and which could not by the exercise of reasonable diligence have been produced by such party. If the Tribunal thinks that a *prima facie* case for revision is disclosed in the demand, it will cause notice thereof to be given to the other parties concerned of the

¹¹⁸ The action taken in this case is recounted by the American Commissioner in his decision fixing the fees of the attorneys in the case. *John F. Hamann, Executor of the Estate of Frederick C. Hamann, deceased, claimant*, Docket No. 10841, Decision No. 74 in the matter of fixing reasonable fees for attorneys or agents under the authority of the "Settlement of War Claims Act of 1928" (Washington, 1931).

¹¹⁹ II Moore's *Arbitrations* 1357-1358.

place and time when the Tribunal will hear the parties and decide upon the demand for revision. If the Tribunal decides in favor of revision, it will give such directions with regard thereto as may be necessary."¹²⁰

The proper limitations of the application of the procedure of revision have been fairly well defined by the cases in which these rules were invoked. Revision has been sharply distinguished from review. The tribunals have made it clear that the application for revision must relate to matters of fact, and that they did not intend in providing for revision in the rules to afford an opportunity for a reconsideration of questions of law. Thus in the case of *Epoux Ventense v. État S.H.S.*, the German-Jugoslavian Tribunal declared that in introducing revision "it has not intended to create, through an indirect method, a second trial not provided by the Treaty of Versailles, in which the High Contracting Parties have agreed . . . to consider the decisions of the Mixed Arbitral Tribunals as final. (Art. 304, par. g.)"¹²¹

Since revision constitutes an extraordinary procedure, the formal and imperative restrictions upon the receivability of an application for revision must be strictly complied with. The Tri-

¹²⁰ 1 *Recueil des décisions* 622, 635. For similar rules, see Anglo-Bulgarian, Art. 96, *ibid.* 652; Anglo-Hungarian, Art. 91, *ibid.* 668; Austro-Belgian, Art. 76, *ibid.* 181; Franco-German, Arts. 79-82, *ibid.* 55; German-Belgian, Art. 76, *ibid.* 43.

¹²¹ 7 *Recueil des décisions* 79, 82, (1923). Accord: *Heim and Chamant v. État allemand*, 3 *Recueil des décisions* 50, 54-55 (1924). For a preliminary ruling in this case denying a motion by France that certain documents submitted by Germany should not be received because of their confidential character, see 1 *Recueil des décisions* 768 (1922). *Fourchet v. État autrichien*, 9 *Recueil des décisions* 282 (1929), French-Austrian Tribunal. Dr. Karl Strupp has rightly pointed out that "this action for restitution . . . mildly termed revision . . . is not in contradiction to the Treaty of Versailles." "The Competence of the Mixed Arbitral Courts of the Treaty of Versailles," 17 A.J.I.L. 661, 684-685 (1923).

"Att. qu'il ne saurait, en effet, être question d'apprécier, en matière de revision, si le Tribunal a exactement ou non interprété un ensemble déterminé de faits; que cela constitué précisément la tâche d'un juge d'appel et que l'appel n'existe pas en ce qui concerne la juridiction des Tribunaux arbitraux mixtes; que le seule tâche à laquelle doit s'astreindre le juge de la revision est celle qui consiste à déterminer si un élément nouveau de fait, postérieurement découvert, en prenant sa place dans l'ensemble de la construction des faits, antérieurement examinée, peut en modifier sérieusement la structure et, partant, des conclusions qui en avaient été primitivement tirées; qu'en l'espèce, le Tribunal doit se borner à constater que l'élément de fait avancé par le demandeur n'affecte en aucune façon l'ensemble des faits relatifs à la responsabilité des parties en cause, mais simplement ceux intéressant la qualification du préjudice; que dans ces conditions, la réouverture des débats serait vaine, puisque—théoriquement du moins—il y a lieu de conclure qu'aux données identiques d'un problème: celles intéressant la responsabilité des défendeurs, doit correspondre une solution identique: celle de leur irresponsabilité; qu'actuellement le Tribunal, en effet, ne juge pas un jugement." *Neufstize v. Diskontogesellschaft, Deutsche Bank, S. Bleichroeder and État allemand*, 7 *Recueil des décisions* 629, 633 (1927), Franco-German Tribunal.

bunal, declared the French-Bulgarian Tribunal, "cannot be too rigorous in this examination before accepting a demand which amounts to nothing short of subjecting to discussion the questions definitively decided." The Tribunal refused to receive the application because it was made after the period of one year provided by the rules.¹²²

Newly discovered evidence must be presented in support of the petition for revision, which could not, by the exercise of reasonable diligence, have been discovered prior to the decision, and which is of such a character that it would have exercised a decisive influence if it had been before the tribunal when it was making its decision.¹²³ This rule is in accord with that contained in the Statute of the Permanent Court of International Justice and in the Hague Conventions of 1899 and 1907, and seems to represent a sound practice.¹²⁴ While it is eminently desirable that injustice, resulting from the perpetuation of a decision not in accord with the actual facts, should be avoided if possible, the necessities of stability and of time make it imperative that revision should be so safeguarded as not to put a premium on negligence. If the failure to produce the evidence is due to the party's own negligence, he should surely be compelled to abide by the results. It is obvious that if the new evidence is not of a character to have exercised an important influence on the tribunal's decision, opening the decision for reconsideration is unwarranted.¹²⁵

New evidence concerning facts occurring subsequent to the closing of the case does not constitute a ground for revision.¹²⁶ A

¹²² *Battus v. Etat bulgare*, 9 *Recueil des décisions* 284, 285-286 (1929). Accord: *de Tayrac v. Schmitz and Co.*, 9 *Recueil des décisions* 492 (1929), Franco-German Tribunal.

¹²³ *Krichel v. Etat français*, 8 *Recueil des décisions* 757, 765 (1928), Franco-German Tribunal; *Epoux Ventense v. Etat S. H. S.*, 7 *Recueil des décisions* 82 (1923), German-Yugoslavian Tribunal; *Betz v. Etat allemand*, 9 *Recueil des décisions* 654 (1929), German-Belgian Tribunal.

¹²⁴ See in this connection *Atocha's* case, 8 Ct. Cls. 427 (1872), in which a judgment in favor of Atocha in the amount of \$207,852.60 was made upon the basis of newly discovered evidence which showed that he had not participated in Mexican politics. Evidence which was considered to show such participation of a character to warrant his expulsion by Mexico was relied upon by the Domestic Claims Commission created under the Act of March 3, 1849, in dismissing his claim.

¹²⁵ So applications for rectification were denied where there was no obscurity, no lacuna, no contradiction, or no error in the decision. *Itzig v. Bauer and Etat allemand*, 8 *Recueil des décisions* 130-131 (1928), Franco-German Tribunal.

¹²⁶ *Creange v. Busch*, 5 *Recueil des décisions* 114-116 (1924), Franco-German Tribunal; *Otsensberger v. Etat allemand*, 9 *Recueil des décisions* 272, 274 (1929), Franco-German Tribunal; *Krichel v. Etat français*, 8 *Recueil des décisions* 757, 765 (1928), Franco-German Tribunal. For a discussion of the distinction between the discovery and the arising of a fact see *Battus v. Etat bulgare*, 9 *Recueil des décisions*, 284, 285 (1929), French-Bulgarian Tribunal.

demand for revision may be prosecuted only by a party to the proceedings resulting in the decision of which a revision is sought.¹²⁷ The German-Belgian Tribunal, in holding unfounded a demand for revision, declared that an accompanying request for a delay of four months in the execution of the judgment involved a question "absolutely different from the question of revision," and one to be determined in a separate proceeding.¹²⁸

Section 111. Conclusions. The rules thus adopted and applied by the Mixed Arbitral Tribunals seem to be both reasonable and sound, and in accord with previous precedents, with the possible exception of the rule stated in the *Sabotage* cases, and the *Philadelphia Girard National Bank* case in the American-German Mixed Claims Commission.¹²⁹ Any tribunal having similar authority under the agreement creating it, particularly a mixed claims commission, has authority to entertain petitions for revision under circumstances similar to those provided in the rules of the Mixed Arbitral Tribunals, and to amend decisions entered, upon the production of satisfactory evidence in support of the petition. The fact that specific provision for revision was made in the rules of the Mixed Arbitral Tribunals added nothing to the powers of those Tribunals since they were merely exercising the normal prerogative of such tribunals to formulate their own rules of procedure. The action thus taken merely indicates that in the opinion of these tribunals the authority to grant revision of awards, with appropriate safeguards, inheres in the power of the tribunal to control its procedure, subject to the limitations of the arbitral agreement. This conclusion appears to be sound in principle and warranted by the exigencies of international judicial procedure.

The provisions of the Hague Conventions of 1899 and of 1907 in Articles 55 and 83, respectively, and of the Statute of the Permanent Court of International Justice in Article 61, are directed primarily to the situation presented when the necessity for revision becomes apparent after the life of the tribunal has expired. They both contemplate a demand for revision to the same tribunal which rendered the decision. It seems clear that unless, as provided in the Hague Conventions, the parties have reserved the right to make such a demand for revision, the tribunal would have no authority to hear it. The procedure thus contemplated represents sound practice, since a petition for revision to any other tribunal would

¹²⁷ *Société française de Banque et de Dépôts v. Tietz*, 8 *Recueil des décisions* 766-767 (1928), Franco-German Tribunal.

¹²⁸ *La Suedoise v. Roller*, 4 *Recueil des décisions* 315-316 (1924). Compare with the third paragraph of Article 61 of the Statute of the Permanent Court of International Justice which provides: "The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision."

¹²⁹ *Supra*, sec. 97.

necessarily take the form of review rather than revision, as the necessary action could only be taken intelligently after a reexamination and rehearing of the case. That revision, while offering a safeguard of undoubted value, will not be abused in practice is indicated by the fact that the procedure has not been invoked either in the Permanent Court of International Justice or in arbitrations carried out under the Hague Conventions.

Although fraud in matters of evidence is not specifically mentioned either in the Hague Conventions or the Statute of the Permanent Court, or in the rules of the Mixed Arbitral Tribunals, it seems fairly certain that it would be regarded as included in a "new fact," or as evidence which "if known to the tribunal . . . would have exercised a decisive effect upon its judgment." Such was indicated to be the case in the discussion which took place during the drafting of Article 55 of the Hague Convention of 1899.¹³⁰ Evidence of fraud of a decisive character would be more likely, in most instances, to result in the voiding of the award than in its revision.¹³¹

¹³⁰ *Supra*, pp. 317-318. In discussing this point with reference to the provisions in the Hague Conventions, Fauchille says:

"On devrait, au contraire, considérer comme un fait nouveau au sens des actes de la Haye la découverte de faux commis dans les documents produits par une partie à l'appui de sa prétension: cette question aurait pu se poser dans l'arbitrage convenu en 1914 entre l'Allemagne et la France au sujet des litiges miniers du Maroc (affaire Mannesmann), si les faux commis par la partie allemande dans les traductions de certaines pièces invoquées par elle, au lieu d'être découverts par les agents français au cours de l'arbitrage, ne l'avaient été que postérieurement à la sentence de l'arbitre." Fauchille, *Traité de droit international public* (Paris, 1926), 8th ed., vol. I, pt. 3, p. 567.

In this case, which it appears was submitted to an international tribunal in 1914, the tribunal held certified copies of mining reports furnished by the claimants to have been forged in important details, basing their conclusion upon a comparison of the copy with the original discovered and presented during the proceedings by the Moroccan Agent. *Ibid.* 568.

¹³¹ In relation to the general question of rehearing and revision see the proposal made by Finland to confer appellate jurisdiction upon the Permanent Court of International Justice. League of Nations Document A.21.1929 V; League of Nations Official Journal, Sp. Supp. No. 74, p. 17; *ibid.* Sp. Supp. No. 83, p. 12; *ibid.* Sp. Supp. No. 92, p. 11. For comment see R. V. Caballero de Bedoya, "Etat actuel de la question de la Cour permanente de Justice internationale considérée comme instance de recours," 6 *Rev. de droit int.* 142-167 (1932); Simon Runstein, "La Cour permanente de Justice internationale comme instance de recours," *Académie de droit int., Recueil des Cours*, 1933, I, vol. 43, pp. 5-113.

CHAPTER X

CONCLUSIONS

Section 112. Influence of Anglo-American and Civil Law: In General. Although in its predominant characteristics, the practice in the production of evidence before international tribunals bears more resemblance to civil law procedure than to Anglo-American, important features bear the imprint of the latter.

The most distinctive characteristic of procedure before international tribunals is its freedom from restrictive rules in the admission of evidence. In this it resembles the civil law. But this has apparently been due to the necessities of the situation rather than to any direct influence exerted by the civil law. So in the admission of hearsay, in its preponderant reliance upon evidence in written forms, and in its sparing use of direct oral evidence, international judicial procedure parallels the practice of civil law countries. In rules concerning the burden of proof, the production of evidence, including notice of evidence to be produced, and the activity of the judges in supplementing evidence produced by the parties, the taking of testimonial evidence, and in the use of experts and expert inquiries, international procedure closely parallels civil law procedure. Here again it must be observed, however, that while the taking of evidence outside the court before a judge to whom this function has been delegated is generally considered to be typical of civil law procedure, the tendency in Germany is to have witnesses, as a rule, examined directly in open court.

Probably the most significant contribution of Anglo-American procedure to the law of evidence in international judicial procedure is the use of the affidavit, a means of proof originally unknown to the civil law. Although the affidavit as an instrument of proof has clearly been derived from Anglo-American law, it might be said with accuracy that if such a procedure for presenting evidence had not existed it would have had to be devised in order to meet the needs of international judicial procedure. The so-called system of "free" proof obtaining in international procedure, that is, of permitting the parties to present any evidence they see fit, originated in Anglo-American practice. Likewise, the free evaluation of evidence by the jury is a characteristic feature

of Anglo-American procedure adopted not only in international procedure, but in the procedure of most civil law countries as well. The "best evidence" rule as applied in international procedure is similar to the rules on the subject in Anglo-American procedure. With reference to the testimony of interested parties, international procedure has developed a more liberal rule than either civil or Anglo-American law, but one in the main similar to the latter. So also are derived from Anglo-American law the rules of judicial notice, but in this respect again it is essential to note that the German law is similar to Anglo-American rather than to the so-called civil law.

There are certain respects in which international rules of evidence find their counterparts both in civil and Anglo-American law. All three systems agree, for example, that awards must be based on the evidence produced. However, under civil law procedure, the judges generally have a broader authority to supplement that evidence by requiring the production of further evidence than is customarily exercised by Anglo-American judges. There is a similarity in the rules of the two with reference to the production of the originals and certified copies of documents, international procedure being more liberal, in general, than either with reference to the use of certified copies. While the device of discovery or interrogation of the parties has not been used widely in international proceedings, to the extent that it has been employed, it has been derived from a similar procedure in both systems. Millar points out the increasing extent to which the mechanism of fact discovery has been approaching a common form in Anglo-American and civil law procedure, involving an increasing trend toward the method of oral examination. Similarly, the few rules of international procedure concerning the privilege of exclusion accorded to evidence because of its confidential character bear an equivalent resemblance to the rules of Anglo-American and of civil law.

In view of the extent to which Great Britain and the United States have participated in international arbitration, it might have been anticipated that the common law rules of evidence would have exerted a preponderant influence on the development of the international law of evidence. The fact that it has not is in itself convincing evidence of the pragmatic character of the development of that law. One fact that stands out clearly from this survey is that international tribunals have exercised a free and, in general, intelligent discrimination in the adoption of rules best fitted to the needs of the situations confronting them, without any especial regard to the system of law from which they may have come. The result has been the development of an independent and flexible system which by an almost unconscious process of synthesis has absorbed desirable features from both systems, without submitting

slavishly to the influence of either. This is not to discount the fact that in its more fundamental features the international law of evidence bears a predominant resemblance to the civil law of evidence, but to invite attention to the fact that this appears to have been due to the nature of the tribunals themselves, and to the fact that rules analogous to civil law rules fitted the needs of the case, rather than to a conscious copying of the civil law rules as such. It is inherently improbable, for example, that Anglo-American tribunals would have deliberately borrowed their rules from civil law procedure, yet the rules adopted by such tribunals generally exhibit the same characteristic civil law features as those of other tribunals. A final item confirming the validity of this conclusion is the fact that international procedure while embodying the liberal practice of the civil law in the admission and evaluation of evidence has disregarded technical rules concerning such matters as the formalities surrounding the preparation of written evidence generally obtaining in such procedure.

Section 113. The Same: The Permanent Court of International Justice. The Statute and Rules of the Permanent Court of International Justice bear the clear impress of the influence of civil law procedure. They appear in fact to a considerable extent to have been based consciously and deliberately upon what the judges sometimes refer to as "continental procedure." During the preparation of the Rules of the Court in 1922, the President observed that the Statute was "based chiefly on continental procedure."¹

In their total effect and practical operation, however, the Rules of the Court show no great variation from the general practice of other international tribunals. The Rules have been much more carefully and closely drafted with a view to meeting all contingencies that may arise, but they reveal approximately the same civil law and Anglo-American features as the rules applied by tribunals in general. One principal difference is in the matter of affidavits. The rules do not specifically contemplate their use, and the nature of the cases and the identity of the parties (largely from civil law countries) coming before the Court have not been of a character to raise the question of their use. As previously pointed out affidavits have been presented and admitted in one instance, however.²

The Court has exhibited a sense of the necessity and desirability of taking account of certain phases of Anglo-American procedure. Thus it has construed the absence of restrictive rules in the Statute to mean that a party may generally produce any evidence as a matter of right so long as it is produced within the time limits fixed by the Court. Nevertheless, in implementing Arti-

¹ *Supra*, p. 33.

² *Supra*, p. 180.

cle 52 of the Statute, it provided in Article 48 of the 1936 Rules that evidence produced after the time limits fixed by the Court could only be accepted with the consent of the other party, and in the absence of such consent with the permission of the Court. The President pointed out during the discussion of the text of this rule that the Drafting Committee had tried to keep in mind the Anglo-American system as well as that prevailing on the continent of Europe since "if the Article did not stress the fact that the Court had power in all circumstances to reject the document without first examining it, it would give rise to misgivings in Anglo-American legal opinion."³ In another instance, when the Court was considering a revision of Article 54 of the 1922 Rules concerning the correction of the record of his testimony by a witness, M. Anzilotti declared that the Court must choose between two systems, one in which only what was written was taken into account, the other in which what mattered was the immediate and direct impression received by the judge from the witness. He said that in a court like the Permanent Court of International Justice the witness' oral evidence should be decisive.⁴ This was an endorsement of an essentially Anglo-American principle.

Other instances might be cited of the readiness of the Judges to adopt Anglo-American practice where it seems better fitted to the needs of the Court. Thus the Court adopted the practice under which the parties are free to submit any evidence they see fit rather than that in which the Court exerts a decisive control over the evidence to be produced. Then again the method of procedure providing for the examination of witnesses shows a definite similarity to Anglo-American practice.

It is unnecessary to set forth a comprehensive survey of the Court's practice here. Enough has been said to make it clear that while consciously basing its procedure, including the rules of evidence, on "continental" procedure, the Court has been prompted in the formulation of its rules and the development of its practice primarily by considerations relating to the suitability of any given rule to the peculiar necessities of international judicial procedure. As a result, it is developing a system of evidence marked by the simplicity necessary for the prompt and fair disposition of complex international cases, but at the same time sufficiently specific in detail to prevent parties from taking unfair advantage of a procedure characterized by the absence of restrictive rules.

Section 114. General Conclusions. The international tribunals whose practice in relation to the production of evidence before them is portrayed in the preceding pages are courts of limited authority. The charter of their powers, both as to their substan-

³ *Supra*, p. 58.

⁴ *Supra*, pp. 228-229.

tive jurisdiction and their procedure, is the arbitral agreement which creates them. Consequently, the law concerning the production of evidence before them is conventional in character. Certain fundamental conclusions flow from this fact.

In each instance, it is primarily to the arbitral agreement that attention must be directed in determining what the tribunal and the parties may or may not do in relation to the production of evidence. The propriety of their action must be determined, in every case, by reference to the provisions of the agreement considered in the light of the design of the parties in adopting those provisions. Therefore, the exercise of care and the achievement of accuracy in the drafting of provisions relating to evidence in arbitral agreements is a consideration of paramount importance. For if the tribunal and the parties are to be expected to respect the design of the parties concerning the treatment of evidence, that design must be clearly reflected in the language of the agreement.

Three aspects of international practice in matters of evidence need to be considered in the light of this controlling importance of the arbitral agreement. The first is the not infrequent laxity of the parties to numerous arbitral agreements in the drafting of provisions relating to evidence. Although they have usually exercised meticulous care in defining the substantive jurisdiction of the tribunal, they have been too much inclined to leave the tribunal practically to its own devices in handling matters of evidence, or at best to furnish it with loose and indefinite rules to guide its action. The result has been a considerable variation in the quality of the rules of evidence applied by international tribunals. Parties are hardly in a position, however, to complain of laxity on the part of tribunals when they have not furnished them with adequate standards of action.

It may be noted in the second place, on the other hand, that tribunals have not always exhibited a proper regard for the provisions of the arbitral agreement concerning matters of evidence. They have at times turned to so-called generally accepted principles of evidence, or to rules generally applied by arbitral tribunals, rather than to the controlling provisions of their own fundamental charter. Such conduct is much to be deprecated, for it is not calculated to inspire confidence in the process of international judicial settlement of disputes.

Thirdly, in view of the primary importance of the arbitral agreement, it is significant to observe the wide latitude frequently accorded to the tribunal by the terms of the agreement in the determination of rules concerning the production of evidence. On the whole, this practice has been wise and has had happy results. It is not possible for the draftsmen of a treaty to foresee all the detailed problems concerning evidence which may arise in the

course of the proceedings, and it would be unwise to fetter the discretion of the tribunal as to such details. The discretion given to tribunals has enabled them to adopt from the practice of other tribunals suitable and tested rules concerning such matters as the taking of evidence, the form of written documents, and the manner of presentation of oral and written evidence. The flexibility and adaptability of this procedure has contributed to the freedom from technical and restrictive rules which is one of the most admirable features of international practice in the production of evidence. On the other hand, certain basic rules need to be carefully formulated in the agreement, and the failure to do so has at times resulted in serious difficulties. The minimum extent of the matters to be covered in the arbitral agreement would include, in general: (1) rules concerning the nature and extent of the evidence required to be produced by the parties and considered by the tribunal with reference especially to such documents as affidavits; (2) limitations on the time at which evidence may or must be produced; (3) the obligation of the parties with reference to the inspection and discovery of documents in their exclusive possession; (4) the extent of the authority of the tribunal to require the production of evidence and to compel the attendance of witnesses; (5) a particular procedure that may be desired in the taking of depositions or the examination of witnesses; and (6) provision for rehearing of the case or a revision of the award, if such is desired.

While the terms of the arbitral agreement are controlling, tribunals have been faced, in the absence of provisions in the agreement, with the necessity of taking action on questions arising out of the presentation of evidence. In that situation, they have assumed that under their power to determine their rules of procedure they have the authority to take any necessary action in line with the practice of other tribunals. They would seem to have been warranted in assuming that the parties to the arbitration consented to what they did not prohibit with reference to normal rules of evidence well established in the practice of international tribunals. By analogy to a common rule of statutory construction, the parties may properly be considered to have contracted in contemplation of the existing practice, and to have conferred upon the tribunal authority to apply the rules obtaining in that practice subject to the limitations imposed in the arbitral agreement.

Certain rules have been so repeatedly applied under such circumstances as to approach the character of customary law. However, in view of the status of tribunals as agencies of delegated and limited powers, the rules cannot acquire obligatory force in the sense that a tribunal would be guilty of a violation of international law in disregarding them. Certain practices have become so firmly established, however, as to give a party sound ground

for protest in case they are disregarded. Such, for example, would be true of the rule that new evidence may not be introduced at a stage in the proceedings so late as to make it impossible for the other party to rebut or answer it, and the rule that the genuineness of the originals or copies of documents must be attested by adequate authentication. In practical effect, such rules when embodied in the tribunal's rules of procedure acquire the force of law for that proceeding, for the tribunal has the authority to penalize a party by disregarding or refusing to accept evidence not offered in conformity with the rules.

Strictly speaking, therefore, it is inappropriate to speak in a general sense of rules of evidence in international law. What exists is a general body of practice, which happily has developed a great degree of uniformity, to which tribunals turn for guidance and for relevant principles and standards of action, in the absence of provisions in the applicable arbitral agreements.

There are certain powers which a tribunal may not presume to exercise, however, in the absence of provision in the arbitral agreement, no matter how essential they may seem to the proper production of evidence. A tribunal cannot purport to compel the attendance of witnesses, for example, in the absence of a specific grant of authority to do so. It is doubtful whether, in the absence of specific authority, a tribunal could classify evidence and admit it or reject it on the basis of its intrinsic character. Nor without authorization in the agreement could a tribunal properly refuse to accept evidence not filed with the instrument of the written pleadings to which it relates, simply on the ground of late production. These deficiencies in power emphasize the necessity for care in drafting agreements so as to confer upon the tribunal adequate and specific authority for the proper conduct of the proceedings. One of the most serious deficiencies in the past has been, for example, the failure to make proper provision for compelling the attendance of witnesses, and for the punishment of witnesses guilty of perjury in relation to evidence produced before international tribunals. No arbitral agreement should fail to take account of the necessity for conferring upon the tribunal adequate authority in this matter.

In addition to the effect of the conventional character of the rules, three other factors have exercised a decisive influence on the nature of the practice developed in the production of evidence before international tribunals. They have all contributed to the acceleration of the same tendency, that is, the development of a practice free from technical restrictions in the admission and evaluation of evidence. First, the practical difficulties in the way of obtaining adequate evidence, arising out of physical obstacles in

time and space, and other causes of inaccessibility, have created a necessity for utilizing all evidence that can be obtained. The production of the best evidence available is the broad rule generally applied, although, of course, if that is not sufficient satisfactorily to establish the facts in issue, the case will be dismissed. Second, the nature of the personnel of the tribunal has made unnecessary the enforcement of technical rules, especially with reference to admission. Although the facts have not always accorded with the theory, the members of the tribunals have been assumed to be trained jurists and consequently competent to evaluate discriminatingly any and all evidence submitted.

Thirdly, the purpose of the proceedings, namely, the definitive settlement of disputes between states in a manner to remove them as a source of contention, has resulted in a particular emphasis upon the necessity of conducting the proceedings in such a way as to get at the truth whatever it may be. This has had the effect of causing tribunals to impose upon the parties before them a broader obligation in the production of all evidence in their possession, regardless of its import, than is required in municipal procedure of private litigants. For a like reason, tribunals themselves have exercised considerable initiative in supplementing the evidence voluntarily produced by the parties, either by their own researches or by requiring the parties to produce further evidence.

By granting wide latitude to tribunals in the treatment of evidence produced before them, governments have wisely supported this view that the search for the truth concerning disputed facts in international proceedings should be limited only by the most essential restrictions. However, the successful operation of such a system of evidence requires a firm and intelligent enforcement by the tribunal of the rules concerning the form and production of the evidence thus freely admitted, and efficient and sincere co-operation of the parties in the preparation and prompt and orderly presentation of the evidence. Tribunals have at times failed in a satisfactory disposition of the cases submitted to them, not because of their inability to reject evidence submitted, but because of their failure to require the orderly prosecution of the case, and because of the negligent or contumacious refusal of the parties to comply with necessary and reasonable rules controlling the preparation and production of evidence. The former deficiency can be remedied by a more careful selection of the personnel of the tribunal and by furnishing the tribunal with adequate facilities for the mechanical administration of the procedure of the case, or by an increasing resort to the use of the superior facilities of the Permanent Court of International Justice. The latter can be relieved by endowing the tribunal with adequate authority for penalizing the parties for failure or refusal to comply with customary rules

concerning the form, preparation, and production of evidence. Conferring upon the tribunal an absolute discretion to refuse to receive evidence not submitted in conformity with such rules would probably meet this need in most cases.

The right of tribunals freely to evaluate evidence submitted to them should not be restricted. However, as pointed out in Chapter I, this evaluation should be based upon certain elementary and definitely ascertainable principles of law. It is extremely difficult, however, to state these principles comprehensively and with precision, and it would seem preferable not to attempt to lay them down in advance, at least in the present stage of the development of the practice in the production of evidence. A safer procedure would seem to be to leave them to be charted, after the common law method, by decisions in specific cases, especially in the jurisprudence of the Permanent Court of International Justice. More definite standards are needed especially with reference to the credibility and impeachment of witnesses and of experts, the evaluation of testimony embodied in affidavits and depositions, and the more specific delimitation of the "best evidence" rule, including a more precise statement of the limits of the use of "secondary" evidence.

APPENDICES

For convenience there are set forth in these appendices the texts of the provisions relating to evidence from the principal instruments concerning tribunals of a permanent character, including the Permanent Court of Arbitration at the Hague.

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Abbreviations used in the text are given in brackets following the appropriate items.

I. Sources.

A. Ad hoc tribunals.

1. Claims commissions.
2. The Permanent Court of Arbitration.
3. The International Central American Tribunal.
4. Other tribunals.

B. Permanent tribunals.

1. The Permanent Court of International Justice.
2. The Central American Court of Justice.
3. Permanent joint commissions.
 - a. International Boundary Commission, United States and Mexico.
 - b. International Joint Commission, United States and Canada.

C. General sources.

II. Treatises.

III. Periodical literature.

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4. Other Tribunals

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B. PERMANENT TRIBUNALS

1. The Permanent Court of International Justice

Note.—In view of the adequacy and the availability of the publications relating to proceedings in the Permanent Court of International Justice it is not necessary to list those publications in detail here. The bibliography has been limited, therefore, to a statement, according to series, of the publications examined for the purposes of this study.

Cases discussed or cited are listed in the table of cases, and all publications to which reference has been made are fully set forth in the text or the footnotes.

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